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United States District Court, E.D. New York.

Gardy AUGUSTIN, et al., Plaintiffs,
v.
Joseph JABLONSKY, individually and as the Nassau County Sheriff, et al., Defendants.

No. 99CV3126(DRH)(ARL). | March 8, 2001.

Attorneys and Law Firms

Herbst & Greenwald LLP, New York, New York, By: Robert L. Herbst, for Plaintiffs.

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Opinion

MEMORANDUM OPINION AND ORDER

HURLEY, J.

***1** Pending before the Court is Plaintiffs' motion (1) for consolidation of the above-captioned case with *O'Day v. Nassau County, et al.,* 99-CV-2844 [hereinafter "*O'Day* Action"], and *Iaffaldano v. County of Nassau,* 99-CV-4238 [hereinafter "*Iaffaldano* Action"], for all purposes; (2) certification of the consolidated case as a unified class action pursuant to Federal Rule of Civil Procedure 23(a), (b)(2), and (b)(3); (3) appointment of Herbst & Greenwald LLP as class and lead counsel; and (4) appointment of Wolf Haldenstein Adler Freeman & Herz LLP and Cromwell & Yerman as class counsel. (Notice Mot. ¶¶ 1-4.) The *Iaffaldano* Action plaintiff consents to the relief sought in Plaintiffs' motion. (Mem. Law Supp. Pls.' Mot. Consol. & Class Certif. at 2.) The *O'Day* Action plaintiff does not. (*Id.*)

Defendants urge the Court to deny Plaintiffs' motion in its entirety, or, in the alternative, to issue an order affording Defendants an opportunity to conduct discovery as to certain class certification issues before ruling on Plaintiffs' motion. (Defs.' Mem. Law Opp'n Pls.' Mot. Class Certif. & Consol. at 24-25.) *Iaffaldano* Action defendants Port Washington Police District and William Kilfoil [hereinafter "Port Washington Defendants"] also oppose Plaintiffs' motion, contending that the Port Washington Defendants will be severely prejudiced by the inclusion of the *Iaffaldano* Action against the Port Washington Defendants as part of a class, or subclass, of Plaintiffs' putative class action. (Mem. Law Opp'n Pls.' Mot. Consol. & Class Certif. [hereinafter "Port Wash. Defs.' Mem. Law"] at 1-2.)

For the reasons set forth below, Plaintiffs' motion is granted as to consolidation of the three actions, but is otherwise denied.

I. BACKGROUND

In 1996, counsel for Plaintiffs in this action represented the plaintiff in *Shain v. Ellison,* 96-CV-3774, an action pending before Judge Wexler in which an arrestee claimed, inter alia, that he had been strip searched at the Nassau County Correctional Center (NCCC) in violation of his constitutional rights. (Aff. Supp. Pls.' Mot. Consol. & Class Certif. ¶ 2.) On April 30, 1999, Judge Wexler announced his intention to grant summary judgment in favor of the plaintiff in that action, (*id.* ¶ 3), and on June 1, 1999, issued a memorandum and order declaring NCCC's "blanket" policy of strip searching all misdemeanor and minor offense arrestees, without any suspicion that such arrestees are concealing weapons or other contraband, violative of the Fourth Amendment to the United States Constitution. *See Shain v. Ellison,* 53 F.Supp.2d 564, 565 (E.D.N.Y.1999).

The three § 1983 actions that Plaintiffs seek to consolidate were all filed after Judge Wexler announced his intention to grant summary judgment. (Aff. Supp. Pls.' Mot. Consol. & Class Certif. ¶ 7.) The first case brought was the *O'Day* Action, filed May 20, 1999. (*Id.*) The *O'Day* Action plaintiff seeks to represent two overlapping classes comprised of (1) all persons arrested in Nassau County for non-felony offenses who have been strip searched at NCCC prior to arraignment, and (2) those who, after being arraigned and unconditionally released by a court, were nevertheless brought back to NCCC for processing and strip searched prior to their release. (*Id.* & Ex. 5 ¶ 17.) The class period for the *O'Day* Action would commence on May 20, 1996, and end the date [NCCC] is "enjoined from, or otherwise cease[s], enforcing [its] unconstitutional policy, practice and custom of conducting strip searches absent reasonable suspicion." (*See id.* Ex. 5 ¶ 18.) The *O'Day* Action seeks compensatory damages, punitive damages, attorneys'

fees, declaratory relief that the NCCC policy is unconstitutional, and injunctive relief prohibiting strip searches absent particularized, reasonable suspicion that the pre-arraignment arrestee or post-release detainee subjected to the search is concealing weapons or other contraband. (*See id.* Ex. 5 at 16-17.)

***2** The instant action was filed June 3, 1999, and sought to represent all non-felony arrestees admitted to NCCC and strip searched "pursuant to [D]efendants' unconstitutional policy, practice and custom of strip searching such persons ... without particularized reasonable suspicion." (*See id.* ¶ 8 & Ex. 3 ¶ 26.) The class period for this action would commence on June 3, 1996, and end the date [NCCC] is "enjoined from, or otherwise cease[s] ... enforcing [its] unconstitutional policy, practice and custom of conducting strip searches of admittees without particularized reasonable suspicion." (*See id.* Ex. 3 ¶ 27 .) The Complaint seeks compensatory damages, punitive damages, attorneys' fees and costs, declaratory relief that the NCCC policy is unconstitutional, and injunctive relief prohibiting enforcement or implementation of the NCCC policy. (*See id.* Ex. 3 at 28.)

The *Iaffaldano* Action was filed July 27, 1999, and sought to represent all persons arrested in Nassau County for non-felony offenses "and then strip searched by Port Washington Police District personnel and/or Nassau County personnel without reasonable suspicion that they were concealing weapons or other contraband." (*See id.* ¶ 9 & Ex. 4 ¶ 16.) The class period for the *Iaffaldano* Action would commence July 27, 1996, and end on the date when the relief sought therein is granted. (*See id.* Ex. 4 ¶ 16.) The action seeks compensatory damages, punitive damages, attorneys' and experts' fees, interest and costs, declaratory relief that the Nassau County and Port Washington Defendants' policies of conducting routine strip searches of non-felony arrestees without reasonable suspicion that such arrestees are carrying weapons or other contraband are unconstitutional, and injunctive relief prohibiting the administration of such policies. (*See id.* Ex. 4 at 23-24.)

Plaintiffs now seek consolidation of the three actions and certification of a unified class of plaintiffs defined as "all persons arrested for or charged with non-felony offenses who have been admitted to the [NCCC] and strip searched without particularized reasonable suspicion." (Notice Mot. ¶ 2.) The Court addresses class certification before discussing consolidation and appointment of lead counsel.

II. CLASS ACTION CERTIFICATION

A. STANDARDS FOR CERTIFICATION

Class action certification is governed by Federal Rule of Civil Procedure 23. Under Rule 23(a), there are four prerequisites to certification of a class:

> (1) the class is so numerous that joinder of all members is impracticable, (2) there are questions of law or fact common to the class, (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class, and (4) the representative parties will fairly and adequately protect the interests of the class.

Fed.R.Civ.P. 23(a). In addition to Rule 23(a), a class action must qualify under one of the alternatives set forth in Rule 23(b). Here, Plaintiffs rely on Rule 23(b)(2) and/or 23(b)(3), under which a class action may be maintained if

***3** (2) the party opposing the class has acted or refused to act on grounds generally applicable to the class, thereby making appropriate final injunctive relief or corresponding declaratory relief with respect to the class as a whole; or

(3) the court finds 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), (b)(3).[1]

Class certification may be granted only if the court "is satisfied after a 'rigorous analysis' that the Rule 23 requisites have been satisfied." *Selby v. Principal Mut. Life Ins. Co.,* 197 F.R.D. 48, 54 (S.D.N.Y.2000), *recons. denied,* No. 98-CV-5283, 2000 WL 1863760 (S.D.N.Y. Dec. 20, 2000); *see General Tel. Co. of Southwest v. Falcon,* 457 U.S. 147, 161 (1982). Plaintiffs bear the burden of establishing the requirements of Rule 23 and failure to meet any one of the necessary criteria will defeat the motion. *See Ansari v. New York Univ.,* 179 F.R.D. 112, 114 (S.D.N.Y.1998). While Rule 23 does not authorize a court to inquire into the merits of a suit, the court may go beyond the pleadings and consider the range of proof necessary to support class certification. *Daniels v. City of New York,* No. 99-CV-1695, __ F.R.D. __, __, 2001 WL 62893, at *2 n.5 (S.D.N.Y. Jan. 25, 2001) (citing *Falcon,* 457 U.S. at 157, 160). Finally, courts have considerable discretion in determining whether to certify a class. *See Pecere v. Empire Blue Cross & Blue Shield,* 194 F.R.D. 66, 69 (E.D.N.Y.2000).

B. RULE 23(A) PREREQUISITES TO CERTIFICATION OF A CLASS

1. Numerosity

For a court to certify a class, Rule 23(a)(1) requires a finding that the numerosity of the members of the putative class makes joinder of all its members "impracticable." *Robidoux v. Celani,* 987 F.2d 931, 935 (2d Cir.1993). Impracticable, in this context, simply means difficult or inconvenient. *See id.; Primavera Familienstiftung v. Askin,* 178 F.R.D. 405, 409 (S.D.N.Y.1998). Plaintiffs need not provide a precise quantification of their class, so long as they "show some evidence of or reasonably estimate the number of class members." *See Pecere,* 194 F.R.D. at 69 (internal quotation marks omitted).

In the instant case, the putative class is defined as "all persons arrested for or charged with non-felony offenses who have been admitted to the [NCCC] and strip searched without particularized reasonable suspicion." (Notice Mot. ¶ 2.) Although the burden is on Plaintiffs to prove numerosity, Defendants do not seriously contend that this prerequisite has not been satisfied.[2] Moreover, Defendants' declaration in opposition to this motion itself establishes that during the last three calendar years in which the "blanket" strip search policy was in effect, NCCC processed at least 19,211 inmate admissions for non-felony offenses. (Donahue Decl. ¶¶ 18, 19; *see also* Aff. Supp. Pls.' Mot. Consol. & Class Certif. ¶ 6.) The Court easily concludes that the numerosity of putative class members would make joinder impracticable.

2. Common Questions of Law and Fact

***4** The "commonality" prerequisite of Rule 23(a)(2) requires that Plaintiffs show the existence of an aggrieved class of plaintiffs by showing that there are questions of law and fact common to the class. *Bishop v. New York City Dep't of Housing Pres. & Dev.,* 141 F.R.D. 229, 237 (S.D.N.Y.1992). The "centrality" of one common issue may be sufficient to satisfy this element. *See In re "Agent Orange" Prod. Liab. Litig.,* 818 F.2d 145, 166-67 (2d Cir.1987); *see Labbate-D'Alauro v. GC Serv. Ltd. P'ship,* 168 F.R .D. 451, 456 (E.D.N.Y.1996) ("The critical inquiry is whether the common questions are at the 'core' of the cause of action alleged."). Where the injuries complained of by named plaintiffs allegedly result from the same unconstitutional pattern, practice, or policy of the defendants, the commonality requirement is usually satisfied. *See Marisol A. v. Giuliani,* 126 F.3d 372, 376-77 (2d Cir.1997) (per curiam) (commonality satisfied with respect to putative class of children who would be at risk of abuse or neglect while in custody of city administration for children's services where injuries to children were alleged to have arisen "from a unitary course of conduct by a single system"); *Labbate-D'Alauro,* 168 F.R.D. at 456 ("[W]here the question of law involves standardized conduct of the defendant to the plaintiff, a common nucleus of operative fact is typically presented and the commonality requirement is usually met." (internal quotation marks and alterations omitted)).

In the case at bar, a common factual question occupying a position of "centrality" to this litigation is whether Defendants engaged in a policy under which all members of the putative plaintiff class were strip searched at NCCC without individualized reasonable suspicion. Common legal questions are whether that policy was unconstitutional, and whether Defendants, or some of them, may be held liable therefor. Under these circumstances, the commonality requirement is satisfied. *Cf. Daniels,* 198 F.R.D. at __, 2001 WL 62893 at *7 (commonality satisfied with respect to putative class of arrestees where injuries were alleged to have resulted from the same unconstitutional practice of stopping and frisking individuals without the reasonable articulable suspicion required by the Fourth Amendment).

Defendants challenge Plaintiffs' showing of commonality by urging that there is

> a myriad of individual questions which will require separate trials to determine (1) whether a purported class member satisfies the class definition (i.e., (a) whether, despite the blanket strip search policy, there were reasonable grounds to search the individual and (b) whether the purported class member has standing under the [Prison Litigation Reform Act]); (2) whether, and to what extent, a class member's purported emotional and psychological injuries emanated from the strip search[;] and (3) the extent of those psychological injuries.[ ]

***5** (Defs.' Mem. Law Opp'n Pls.' Mot. Class Certif. & Consol. at 13 (footnote omitted).

Although the "myriad of individual questions" identified by Defendants is germane to the Rule 23(b)(3) inquiry as to whether questions affecting individual members predominate over the common questions of law or fact, *see* discussion *infra* Part II.D.1, it will not defeat Plaintiffs' showing of commonality under Rule 23(a)(2). *See, e.g., Daniels,* 198 F.R.D. at __, 2001 WL 62893 at *7; *In re Copley Pharm., Inc.,* 158 F.R.D. 485, 489, 491 (D.Wyo.1994).

3. Typicality and Adequacy of Representation

The typicality requirement of 23(a)(3) is satisfied when "each class member's claim arises from the same course of events and each class member makes similar legal arguments to prove the defendants' liability." *Pecere,* 194 F.R.D. at 71 (internal quotation marks omitted); *see Ray M. v. Board of Educ.,* 884 F.Supp. 696, 699 (E.D.N.Y.1995). This prerequisite "does not require that the factual background of each named plaintiff's claim be identical to that of all class members; rather, it requires that the disputed issue of law or fact occupy essentially the same degree of centrality to the named plaintiff's claim as to that of other members of the proposed class." *Caridad v. Metro-North Commuter R .R.,* 191 F.3d 283, 293 (2d Cir.1999) (internal quotation marks omitted).

The adequacy-of-representation prerequisite of Rule 23(a)(4) is measured by two standards. First, plaintiffs' interests must not be antagonistic to those of other members of the class. Second, plaintiffs' attorneys must be qualified, experienced and able to conduct the litigation.[3] *Baffa v. Donaldson, Lufkin & Jenrette Sec. Corp.,* 222 F.3d 52, 60 (2d Cir.2000); *SEC v. Drexel Burnham Lambert Group, Inc. (In re Drexel Burnham Lambert Group, Inc .),* 960 F.2d 285, 291 (2d Cir.1992).

The proposed named plaintiffs in the putative unified class action are Gardy Augustin, Heidi Kane, Mary Katherine Pugliese, Gregg Wills, Steven Roth, Oscar Avelar, Ralph DiLiello, and John Iaffaldano. (Aff. Supp. Pls.' Mot. Consol. & Class Certif. ¶ 13.) Each proposed named plaintiff claims to have been arrested on a non-felony charge, admitted to NCCC, and strip searched at the time the uniform policy was in effect. (*See id.*) Each proposed named plaintiff seeks compensatory damages for "emotional pain, suffering, and mental anguish" (*id.*), punitive damages, and declaratory and injunctive relief. These core claims of the named plaintiffs arise from the same course of conduct of the Defendants, and are the same claims for which plaintiffs seek class certification. Under these circumstances, Plaintiffs have satisfied the element of typicality.

Defendants contend that because Plaintiffs have "cast[ ] their injuries as 'emotional' in nature," they "cannot establish that their damage claims are typical of the other members of the class," and "derivatively, have not established that the class members' damages are so similar that they will adequately represent the interests of other class members." (Defs.' Mem. Law Opp'n Pls.' Mot. Class Certif. & Consol. at 22.) It appears to be Defendants' theory both (1) that claims for emotional injuries are inherently individualistic, such that the injuries suffered by the named plaintiffs cannot be considered typical of those that may have been suffered by other members of the putative class (*see id.*); and (2) that the claims of these particular named plaintiffs are not typical of those of the putative class because "typical" members of the putative class are "generally hardened criminals" who either (a) have been strip searched several times by other law enforcement agencies such that they can no longer "claim any real emotional trauma from the two minute strip search they were required to undergo" at NCCC (Donahue Decl. ¶ ¶ 21-22), or (b) have been legitimately strip searched at NCCC "dozens of times" after contact visits in accordance with the Supreme Court's ruling in *Bell v. Wolfish,* 441 U.S. 520 (1979), such that it is "highly questionable" whether they "could specify the alleged harm they suffered" under the blanket strip search policy (*id.* ¶ 23).

***6** The Court is not persuaded by these arguments. In *Tinetti v. Wittke,* 479 F.Supp. 486 (E.D.Wis.1979), *aff'd,* 620 F.2d 160 (7th Cir.1980), an action for declaratory and injunctive relief to restrain a county sheriff from strip searching persons arrested for non-misdemeanor traffic violations, the court quoted an oral decision of Judge Pratt in describing strip searches as

> an intrusion into personal dignity and privacy ... that for some people at least might cause serious emotional distress. A search of this type [,] including the visual inspection of the anal and genital areas, has been characterized by various witnesses here, and by judges in some other cases, as demeaning, dehumanizing, undignified, humiliating, terrifying, unpleasant, embarrassing, repulsive, [and] signifying degradation and submission.

Id. at 491 (quoting *Sala v. County of Suffolk,* No. 75-CV-486 (E.D.N.Y. Nov. 11, 1978) (unpublished transcript) (Pratt, J.)). Though the degree to which a particular plaintiff suffers emotional injury may depend on factors that are inherently individualistic, a plaintiff's subjection to a mandatory strip search must be considered inherently injurious. The fact that some plaintiffs will suffer severe emotional distress does not diminish the fact that all plaintiffs will suffer at least a dignitary harm.[4]

Defendants' apparent suggestion that the named plaintiffs may be atypical in having suffered severe emotional distress from their strip searches does not persuade the Court these named plaintiffs could not adequately represent their more "hardened" counterparts in the putative class. If anything, the danger of inadequate representation might arise in just the opposite situation, where named plaintiffs suffer only dignitary harm, yet seek to represent and bind a class of plaintiffs that suffered severe emotional injuries. *Cf. Copley Pharm.,*

158 F.R.D. at 490 ("[C]lass actions are intended not to serve the named plaintiffs, but instead to protect the interests of those plaintiffs who have not been named .").

Where, as here, "it is alleged that the same unlawful conduct was directed at or affected both the named plaintiff[s] and the class sought to be represented, the typicality requirement is usually met," notwithstanding certain variations in the fact patterns underlying the individual claims. *Robidoux,* 987 F.2d at 936-37. Further, the Court determines that the claims of emotional injury by the named plaintiffs are not "antagonistic" to the claims of any more "hardened" plaintiffs, such that the adequacy-of-representation prerequisite is also satisfied.

Because each of the four prerequisites of Rule 23(a) are present, the Court addresses whether the circumstances in this case meet either of two Rule 23(b) alternatives proposed.

C. RULE 23(B)(2) CERTIFICATION

As a general proposition, the requirements of Rule 23(b)(2) will be met where the plaintiffs seek declaratory or injunctive relief and they predicate their lawsuit on the defendants' acts and omissions with respect to the putative class. *See Comer v. Cisneros,* 37 F.3d 775, 796 (2d Cir.1994). Although declaratory or injunctive relief need not be the only relief sought under Rule 23(b)(2), such relief must "predominate" over claims for damages for a class to be certified under this subsection. *Eisen v. Carlisle & Jacquelin,* 391 F.2d 555, 564 (2d Cir.1968); *LeGrand v. New York City Trans. Auth.,* 83 Fair Empl. Prac. Cas. (BNA) 1817, 1823 (E.D.N.Y. May 26, 1999); *Kaczmarek v. International Bus. Mach. Corp.,* 186 F.R.D. 307, 313 (S.D.N.Y.1999).

***7** A court may also decline to certify a class under Rule 23(b)(2) pursuant to *Galvan v. Levine,* 490 F.2d 1255 (2d Cir.1973), on the grounds that class relief is not needed either (1) because the declaratory judgment or injunction, if in the named plaintiffs' favor, will run to the benefit not only of the named plaintiffs but of all others similarly situated; or (2) because a state defendant withdraws the policy sought to be enjoined or declared unconstitutional and represents that it has no intention of reinstating it. *See id.* at 1261. These concepts may be thought of as "lack of need" and "mootness," respectively. *Compare* 7B Charles Alan Wright, et al., *Federal Practice & Procedure* § 1785.2 (2d ed. 1986 & Supp.2000) *with id.* § 1785.1.

In this case, Defendants do not challenge that they have acted pursuant to a policy common to all class members and that injunctive relief is requested for the entire class. They contend, however, that the putative class action is " 'about money damages,' not declaratory or injunctive relief," such that class certification is unwarranted, (Defs.' Mem. Law Opp'n Pls.' Mot. Class Certif. & Consol. at 12), a point not specifically addressed by Plaintiffs. Further, Defendants contend, relying on *Galvan,* that because NCCC has terminated its blanket strip search policy, "there is no need" for declaratory or injunctive relief, and class certification under this subdivision "has effectively been mooted." (*Id.* at 10; *see id.* at 10-11.) The Court addresses these arguments in turn.

1. Predominance of Damages Claims

In determining whether damages claims "predominate" over claims for declaratory and injunctive relief for purposes of Rule 23(b)(2), district courts in this circuit have recently relied on the principles articulated in *Allison v. Citgo Petroleum Corp.,* 151 F.3d 402 (5th Cir.1998), a case addressing that issue at great length. *See Parker v. Time Warner Entm't Co.,* No. 98-CV-4265, ___ F.R.D. ___, ___, 2001 WL 28490, at *3-4 (E.D.N.Y. Jan. 9, 2001); *Robinson v. Metro-North Commuter R.R.,* 197 F.R.D. 85, 87-88 (S.D.N.Y.2000). In *Allison,* the United States Court of Appeals for the Fifth Circuit identified those circumstances in which the monetary relief prayed for by plaintiffs so "predominates" over the declaratory or injunctive relief sought that certification under Rule 23(b)(2) must be denied. *See* 151 F.3d at 410-18. The court held that

> monetary relief predominates in (b)(2) class actions unless it is incidental to requested injunctive or declaratory relief. By incidental, we mean damages that flow directly from liability to the class *as a whole* on the claims forming the basis of the injunctive or declaratory relief. Ideally, incidental damages should be only those to which class members automatically would be entitled once liability to the class (or subclass) as a whole is established. That is, the recovery of incidental damages should typically be concomitant with, not merely consequential to, class-wide injunctive or declaratory relief. Moreover, such damages should at least be capable of computation by means of objective standards and not dependent in any significant way on the intangible, subjective differences of each class member's circumstances. Liability for incidental damages should not require additional hearings to resolve the disparate merits of each individual's case; it should neither introduce new and substantial legal or factual issues,

> nor entail complex individualized determinations. Thus, incidental damages will, by definition, be more in the nature of a group remedy, consistent with the forms of relief intended for (b)(2) class actions.

***8** *Id.* at 415 (citations omitted).

The Fifth Circuit applied its holding to the facts of the case on appeal, in which the plaintiffs had sought, inter alia, "compensatory and punitive damages requir[ing] particularly individualized proof of injury, including how each class member was personally affected" by the defendant's conduct:

> We have little trouble affirming the district court's finding that the plaintiffs' claims for compensatory and punitive damages are not sufficiently incidental to the injunctive and declaratory relief being sought to permit them in a(b)(2) class action. We start with the premise that, in this circuit, compensatory damages for emotional distress and other forms of intangible injury will not be presumed from mere violation of constitutional or statutory rights. Specific individualized proof is necessary, and testimony from the plaintiff alone is not ordinarily sufficient. Compensatory damages may be awarded only if the plaintiff submits proof of actual injury, often in the form of psychological or medical evidence, or other corroborating testimony from a third party. The very nature of these damages, compensating plaintiffs for emotional and other intangible injuries, necessarily implicates the subjective differences of each plaintiff's circumstances; they are an individual, not class-wide, remedy.

Id. at 416-17 (citations and footnote omitted).

If Plaintiffs in this case were seeking only nominal damages for the deprivation of their constitutional rights, the Court would have little trouble concluding that their damages claims are incidental to their claims for declaratory or injunctive relief. This is because nominal damages may be awarded in a § 1983 action without proof of actual injury; it is enough that a plaintiff's constitutional rights have been violated. *See Carey v. Piphus,* 435 U.S. 247, 266 (1978). An award of nominal damages on a class-wide basis would be incidental to injunctive or declaratory relief since it would be concomitant with such relief, could be computed by objective standards, and would not flow from each member's individualized reaction to being strip searched, but from the dignitary injury inherent in the constitutional violation.

The opposite is true of Plaintiffs' claims for compensatory damages. Compensatory damages for emotional injury under § 1983 cannot be presumed from the violation of a constitutional right alone; a plaintiff must support his claim with competent evidence that he actually suffered emotional distress. *Id.* at 263-64 & n.20; *see id.* at 260-64. A plaintiff's uncorroborated testimony of emotional distress is insufficient to prove emotional injury, *see Annis v. County of Westchester,* 136 F.3d 239, 249 (2d Cir.1998); the testimony must at least "have some objective correlation with" other evidence probative of emotional distress, *Miner v. City of Glens Falls,* 999 F.2d 655, 662-63 (2d Cir.1993), such as altered interactions with family members, *see id.* at 662, physical manifestations of the emotional injury, the need for counseling, or a diminished ability to perform one's job, *see Annis,* 136 F.3d at 249; *see also Kelleher v. New York State Trooper Fearon,* 90 F.Supp.2d 354, 363-64 (S.D.N.Y.2000) (notwithstanding state trooper's § 1983 liability to arrestee subjected to illegal strip search, arrestee's uncorroborated testimony of headaches, sleeplessness, and general emotional distress stemming therefrom was insufficient as a matter of law to prove emotional injury).

***9** Furthermore, proof of causation for damages attributable to emotional injury under § 1983 may implicate subjective differences between each individual plaintiff. In setting damages, for example, the trier of fact must wrestle with the task of separating the injury fairly attributable to the defendants' misconduct from any other individualized sources of emotional distress. *See, e.g., White-Ruiz v. City of New York,* 983 F.Supp. 365, 393-95 (S.D.N.Y.1997). By way of illustration, some of the emotional injury suffered by members of the putative class could, as Defendants point out, be attributable to "anxiety caused by a legitimate arrest and detention or a court appearance," for which Defendants would not be liable. (Defs.' Mem. Law Opp'n Pls.' Mot. Class Certif. & Consol. at 15.)

Likewise, the punitive damages sought by Plaintiffs cannot be considered incidental to the declaratory and injunctive relief they request. Punitive damages under § 1983 cannot be awarded based on the defendant's constitutional violation alone; the plaintiff must demonstrate that the prohibited conduct was motivated by evil motive or intent, or involved reckless or callous indifference to the plaintiff's constitutional rights. *See*

Smith v. Wade, 461 U.S. 30, 56 (1983).

Even assuming that such motive, recklessness, or indifference can be established on a class-wide basis, it remains questionable whether punitive damages can *ever* be an incidental form of relief under Rule 23(b)(2). *See Jefferson v. Ingersoll Int'l Inc.,* 195 F.3d 894, 898 (7th Cir.1999). To the extent that the Supreme Court's decision in *BMW v. Gore,* 517 U.S. 559 (1996), requires a punitive damages award to be reasonably related to (1) the reprehensibility of the defendant's conduct, (2) the potential or actual harm inflicted upon the plaintiff, and (3) the compensatory damages award itself, *see id.* at 574-83, the propriety of a punitive damages award is dependent, at least in part, on the particular circumstances supporting the compensatory award, as well as its size. Therefore punitive damages will be non-incidental to declaratory or injunctive relief at least in those cases-such as this one-where the compensatory damages prayed for are themselves non-incidental. *See Allison,* 151 F.3d at 417-18. Finally, reason itself suggests that a demand for punitive damages in a substantial amount is non-incidental to a request for declaratory or injunctive relief. *Walthall v. Blue Shield,* 16 Fair Empl. Prac. Cas. (BNA) 626, 629 (N.D.Cal. Sept. 27, 1977).

In short, the non-incidental nature of the compensatory and punitive damages sought by Plaintiffs demonstrates that their money damages claims predominate over their claims for declaratory and injunctive relief. As in *Allison,* class certification under Rule 23(b)(2) would be inappropriate here.

2. Galvan *"Lack of Need" and/or Mootness*

Because the Court has already determined that the putative class should not be certified under Rule 23(b)(2), the Court does not decide whether the *Galvan* doctrine makes Rule 23(b)(2) certification unnecessary. The Court observes, however, that Defendants' evidence that Plaintiffs' claims for declaratory and injunctive relief are moot (Donahue Decl. ¶¶ 16-17), as well as Defendants' representation that "there is absolutely no likelihood that the NCCC will resurrect its prior strip search policy," tend to support the Court's conclusion, *see* discussion *supra* Part II.C.1, that Plaintiffs' damages claims predominate over their claims for declaratory and injunctive relief. Although a court's holding of mootness would appear to be definitive on that point, *see Smith v. University of Wash. Law Sch.,* 233 F.3d 1188, 1196 (9th Cir.2000) (where class claims for declaratory and injunctive relief had become moot, claims for damages "would hardly be incidental" to such relief), the Court sees no reason why the evidence submitted in support of such a holding would not be probative on the question of whether, considering the "realities of the litigation," Plaintiffs' claims for declaratory and injunctive relief are not mere "window dressing" for their damages claims. *See Parker,* 198 F.R.D. at ___, 2001 WL 28490 at *3.

D. RULE 23(B)(3) CERTIFICATION

***10** For a class to be certified under Rule 23(b)(3), Plaintiffs must demonstrate both (1) that the questions of law or fact common to the members of the class predominate over any questions affecting only individual members; and (2) that a class action is superior to other available methods for the fair and efficient adjudication of the controversy.

1. Predominance of Common Questions of Law or Fact

As discussed *supra* Part II.B.2, certain common questions of law and fact touching upon Defendants' liability are central to this lawsuit; whether such issues predominate over individual questions is the matter at issue here. The parties are sharply divided on this issue. The existence of both common and individualized questions are illustrated by the parties' respective positions.

Plaintiffs assert that in addition to the core questions, the following additional common questions predominate:

> (1) whether plaintiffs have stated a claim, (2) the applicability of the *Shain* ruling to this case, (3) whether defendant Joseph Jablonsky was a policy-maker, (4) whether he is entitled to qualified immunity, (5) whether any of the other individual defendants acted recklessly or with callous disregard of plaintiffs' constitutional rights, (6) whether punitive damages are available for strip searches performed before and after the *Shain* ruling was announced, and (7) any effects of the Prisoner Litigation Reform Act (PLRA) or other considerations on litigant standing.

(Reply Mem. Law Supp. Pls.' Mot. Consol. & Class Certif. at 7-8.) The Court views some of these questions with skepticism to the extent they address issues that are collateral to the facts or legal elements Plaintiffs will have to prove to establish their cause of action.[5]

For their part, Defendants contend that there is

> a myriad of individual questions which will require separate trials to determine (1) whether a purported class member satisfies the class

> definition (i.e., (a) whether, despite the blanket strip search policy, there were reasonable grounds to search the individual and (b) whether the purported class member has standing under the [Prison Litigation Reform Act]); (2) whether, and to what extent, a class member's purported emotional and psychological injuries emanated from the strip search[;] and (3) the extent of those psychological injuries.

(Defs.' Mem. Law Opp'n Pls.' Mot. Class Certif. & Consol. at 13 (footnote omitted).) Defendants' contention appropriately raises individualized questions concerning the presence and extent of psychological injuries (i.e., damages), and whether such injuries could be said to have been caused by the strip search of a member of the defined class (i.e., proximate causation).[6] *See* discussion *supra* Part II.C.1.

Finally, the Port Washington Defendants contend that because Plaintiffs' § 1983 claims necessarily require proof of personal involvement of individual defendants, "the viability of a particular claim may depend on findings that differ with regard to different members of a class." (Port Wash. Defs.' Mem. Law at 10-11 .) The Court agrees that § 1983 liability of John and Jane Doe NCCC personnel administering the challenged policy may depend upon findings that differ with regard to different members of the putative class. In *Varrone v. Bilotti,* 123 F.3d 75 (2d Cir.1997), the Second Circuit held that subordinate prison officers who carried out their supervisors' orders to strip search the visitor of an inmate were entitled to qualified immunity from damages even though the subordinate officers did not independently investigate the basis for their supervisors' "reasonable suspicion" that the visitor would attempt to smuggle drugs to the inmate, where the plaintiff had made "no claim that the order was facially invalid or obviously illegal." *Id.* at 81-82. In this case, however, Plaintiffs contend that the blanket strip search policy was illegal on its face, leaving open the possibility that subordinate John and Jane Doe Defendants may be held individually liable for its enforcement. Accordingly, the liability of a particular John Doe Defendant to a particular plaintiff may well hinge upon whether, notwithstanding the facially invalid policy, that John Doe had particularized reasonable suspicion to search that plaintiff-a finding that would differ with respect to each member of the class.

***11** Given the existence of both common and individualized questions, the Court turns to the most factually similar cases from other courts in determining which category of questions predominate. Plaintiffs bring several cases to the Court's attention in which class actions for unconstitutional strip searches were certified pursuant to Rule 23(b)(3). *See Eddleman v. Jefferson County,* No. 95-5394, 1996 WL 495013 (6th Cir. Aug. 29, 1996) (unpublished table decision); *Tyson v. City of New York,* No. 97-CIV-3762 (S.D .N.Y. Mar. 18, 1998) (transcript of oral decision); *Gary v. Sheahan,* No. 96-C-7294 (N.D.Ill. Apr. 10, 1997) (slip op.); *Doe v. Calumet City,* 128 F.R.D. 93 (N.D.Ill.1989); *Smith v. Montgomery County,* 573 F.Supp. 604 (D.Md.1983), *appeal dismissed mem.,* 740 F.2d 963 (4th Cir.1984), *and recons. denied,* 607 F.Supp. 1303 (D.Md.1985).

Defendants cite two cases in which courts refused to certify such class actions. *See Mary Beth G. v. City of Chicago,* 723 F.2d 1263 (7th Cir.1983); *Klein v. DuPage County,* 119 F.R.D. 29 (N.D.Ill.1988). The Court has also discovered twin cases, decided after Plaintiffs' motion was served, in which the United States District Court for the Southern District of Indiana refused to certify such class actions. *See Noon,* 2000 WL 684274; *Bledsoe v. Combs,* No. NA99-153-C-H/G, 2000 WL 681094 (S.D.Ind. Mar. 14, 2000).

Some of the foregoing decisions have no value for present purposes because they merely recite the historical fact that a Rule 23(b)(3) class action was certified in a prior unpublished decision in the same proceeding, *see Calumet City,* 128 F.R.D. at 94, or was not so certified, *see Mary Beth G.,* 723 F.2d at 1267 n.2, without offering any rationale for such certification or non-certification. Other cases are unhelpful because their reasoning appears to based upon the notion that satisfaction of the commonality requirement of Rule 23(a)(2) a fortiori satisfies the predominance requirement of Rule 23(b)(3). *See Gary,* slip op. at 15;[7] *Smith,* 573 F.Supp. at 613.

The remaining cases cited by Plaintiffs are *Eddleman, Tyson,* and *Gary II.* The Court declines to follow *Eddleman* because that unpublished decision is disfavored as precedent pursuant to local rule, *see* 6 Cir. R. 28(g), because that case applied an "abuse of discretion" standard in affirming the district court, 1996 WL 495013 at *2,*6, and because *Eddleman'* s reliance on *Mary Beth G.*-a case in which a 23(b)(3) class action was *not* certified-is unpersuasive.

In *Tyson,* the "central argument" made by the defendants in arguing that common issues did not predominate was that "issues of fact regarding damages remain [ed] and that those issues [would need to be] individually determined." Tr. at 3. In finding a predominance of common questions of law and fact, the Court addressed the defendants' argument as follows:

> ***12** On the damage question, I note that I need not decide at this point whether damages can be awarded on a

> class-wide basis or whether there need to be individualized determinations of damages for each plaintiff. I simply note that the most efficient way to resolve all of the issues in the case is in one forum, and if I should determine that individualized determinations need to be made with respect to each plaintiff, there are numerous options available. If my time is too short to preside over each of the damage determinations, we do have magistrate judges, visiting judges, and the possibility of a special master's involvement.

Id. at 4-5. It seems apparent from this transcript that the court in *Tyson* decided the predominance question without making any determination as to the existence or predominance of individualized questions concerning damages. In this case, the Court sees no reason to put off those issues to another day.

The most persuasive decision favoring Plaintiffs is *Gary II,* in which the defendant moved to decertify the class, arguing that individualized, fact-specific damages inquiries predominated, and that there was an absence of necessary proof of actual harm to the entire class. 1999 WL 281347 at *2-4. The court denied the defendant's motion, ruling-apparently as a matter of law-that varying levels of injury and damages for different class members do not prohibit class certification under Rule 23(b)(3), and observing that the *Gary II* plaintiffs had, in any case, alleged common, class-wide injuries and demonstrated a similarity in the type and severity of injury by way of a psychologist's study incorporating a significant sample of class members. *Id.* at *2-3 & n.2.

On the other hand, the most persuasive decision favoring Defendants is *Klein,* in which the court determined that, even "[a]ssuming that the strip-and-cavity searches are unconstitutional in some or all instances, plaintiffs' claims for damages are particularly unsuited for a class action since each individual determination turns upon numerous factual considerations." 119 F.R.D. at 31. The "emotional constitution" of the person searched was one such consideration:

> Whether inmates suffer "shock, panic, depression, shame, rage, humiliation [or] nightmares" as a result of these searches will have a bearing on their damage awards. Since the extent of any psychological trauma or distress felt by inmates who were searched must be calculated into their damage awards, it will be necessary to inquire into the mental and physical health of each plaintiff before and after the searches were allegedly conducted. Such intimate, individual, and fact specific determinations do not lend themselves to consideration in the context of a class action suit.

Id. at 32 (citations omitted) (alteration original).[8]

In denying class certification under Rule 23(b)(3), the court rendering the twin decisions in *Noon* and *Bledsoe* cited *Klein* approvingly for the proposition that even "if an arrestee can show his or her [constitutional] rights were violated by the [strip] search, any consideration of damages would be individualized ." 2000 WL 684274 at *4; 2000 WL 681094 at *4. *Noon* and *Bledsoe* are helpful to Defendants because they directly controvert Plaintiffs' contention that "[c]ases concerning routine jail strip search policies of misdemeanant arrestees decided after *Klein* have not applied its reasoning." (Reply Mem. Law Supp. Pls.' Mot. Consol. & Class Certif. at 9.) Yet because *Noon* and *Bledsoe* add nothing to *Klein'* s analysis, they contribute nothing more to Defendants' position on the predominance issue.

***13** Having reviewed the common and individualized questions posed by Plaintiffs' theories of relief and the Defendants' expected defenses, the cases most factually on point, as well as a host of other cases, the Court finds that in this case, Plaintiffs have not met their burden of demonstrating that the common questions of law and fact-some of which may have already been answered in *Shain* -predominate over the individualized questions concerning liability, causation, and especially damages. The decision in *Varrone* demonstrates that the § 1983 liability of subordinate John and Jane Doe NCCC personnel may hinge upon findings that differ with respect to each member of the putative class. The decision in *White-Ruiz* illustrates the inherently individualized inquiry with respect to issues of proximate causation for mental distress. *Carey, Annis, Kelleher,* and *Klein* further demonstrate that mini-trials would have to be conducted to ascertain each particular class member's proof of compensatory damages. Finally, the import of the Supreme Court's *Gore* decision suggests that punitive damages claims would need to be similarly determined.

Even if the Court were inclined to follow the reasoning in *Gary II,* the Court considers the holding in that case to have been based significantly upon the plaintiffs' proffer of a psychologist's study demonstrating a similarity in the type and severity of the putative class members' injuries. Plaintiffs' failure to present some or similar evidence on the same point makes that case distinguishable. Moreover, *Gary II'* s holding that varying levels of injury and damages alone will not defeat Rule 23(b)(3) class certification-even assuming that such holding is correctly applied without regard to the facts of any particular case-would not compel certification in this case, where individualized questions exist as to liability, proximate causation, *and* damages.

2. Superiority

The Court is sensitive to Plaintiffs' contention that today's decision means "thousands of people whose constitutional rights were violated [will] be denied a remedy because ... these class plaintiffs [will] be effectively unable to proceed if ... required to press their claims individually." (Reply Mem. Law Supp. Pls.' Mot. Consol. & Class Certif. at 3.) Certainly that concern would militate in favor of a determination that a class action is a superior method to resolve this controversy. *See Labbate-D'Alauro,* 168 F.R.D. at 458; *Smith,* 573 F.Supp. at 613. However, the Court does not decide whether a 23(b)(3) class action would be superior to other available methods for the fair and efficient adjudication of this controversy since its conclusion that common questions of law and fact do not predominate over individualized questions, *see* discussion *supra* Part II.D.1, obviates the need for that decision. Still, the Court observes that this case, in the Court's judgment, does not appear to be one in which the potential recovery is so modest or dwarfed by litigation costs that injured plaintiffs could not bring suit individually.

***14** Further, Plaintiffs' appropriate concern for the vindication of absent putative class members' rights must not unreasonably enjeopard other appropriate concerns for manageability, economy, and judicial integrity. Outstanding issues raised by Defendants concerning each purported plaintiff's satisfaction of the class definition, *see* discussion *supra* note 5, raise manageability concerns and the possibility of mini-trials just to determine class membership. Possible subclasses for claims against the Port Washington Defendants, for claims brought by presently incarcerated plaintiffs subject to the PLRA, or for claims brought by plaintiffs arising from strip searches under NCCC's new policy, raise doubts as to whether "enough economies of time and effort would accrue to the judicial system from resolving the common questions on a class basis to justify the diminution of individual autonomy that inherently results from the certification of a class." *Fisher v. Bristol-Myers Squibb Co.,* 181 F.R.D. 365, 368 (N.D.Ill.1998). Finally, the Court's decision to consolidate these actions, *see* discussion *infra* Part III, diminishes the risk of inconsistent adjudications, such that the need for a prophylactic use of class certification to prevent such adjudications is minimized concomitantly.

E. RULE 23(C)(4)(A) PARTIAL CERTIFICATION

Even where individualized questions concerning damages predominate over common questions of liability, courts have occasionally employed Rule 23(c)(4)(A) sua sponte to partially certify a class action as to the common questions. *See, e.g., Copley Pharm.,* 158 F.R.D. at 491-92; *see also id.* (citing cases); *Valentino v. Carter-Wallace, Inc.,* 97 F.3d 1227, 1234 (9th Cir.1996) ("Even if the common questions do not predominate over the individual questions so that class certification is warranted, Rule 23 authorizes the district court in appropriate cases to isolate the common issues under Rule 23(c)(4)(A) and proceed with class treatment of these particular issues.").

The Court has considered that option here, but declines that approach. It is generally the plaintiffs' responsibility to craft and submit a proposal for partial certification. *Doe I v. Guardian Life Ins. Co. of Am.,* 145 F.R.D. 466, 478 (N.D.Ill.1992) (citing *United States Parole Comm'n v. Geraghty,* 445 U.S. 388, 408 (1980)); *see Lundquist v. Security Pac. Auto. Fin. Serv. Corp.,* 993 F.2d 11, 14 (2d Cir.1993) (per curiam) ("The court ... is not obligated to implement Rule 23(c)(4) on its own initiative."). The Court will not undertake Plaintiffs' burden, especially when there is considerable doubt as to the propriety of using Rule 23(c)(4)(A) in this fashion. *See Castano v. American Tobacco Co.,* 84 F.3d 734, 745-46 n.21 (5th Cir.1996) ("A district court cannot manufacture predominance through the nimble use of subdivision (c)(4). The proper interpretation of the interactions between subdivisions (b)(3) and (c)(4) is that a cause of action, *as a whole,* must satisfy the predominance requirement of (b)(3) and that (c)(4) is a housekeeping rule that allows courts to sever the common issues for a class trial." (emphasis added)); *accord Cohn v. Massachusetts Mut. Life Ins. Co.,* 189 F.R.D. 209, 217-18 (D.Conn.1999); *In re Jackson Nat'l Life Ins. Co. Premium Litig.,* 183 F.R.D. 217, 224-25 (W.D.Mich.1998); *Arch v. American Tobacco Co.,* 175 F.R.D. 469, 496 (E.D.Pa.1997) ("Plaintiffs cannot read the predominance requirement out of (b)(3) by using (c)(4) to sever issues until the common issues predominate over the individual issues."), *aff'd,* 161 F.3d 127 (3d Cir.1998). Accordingly, the Court denies so much of Plaintiffs' motion as seeks class certification and appointment of class counsel.

III. CONSOLIDATION

***15** Plaintiffs seek to have this action consolidated for all purposes under Federal Rule of Civil Procedure 42(a) with the *O'Day* and *Iaffaldano* Actions. Rule 42(a) provides that "[w]hen actions involving a common question of law or fact are pending before the court, it may order a joint hearing or trial of any or all matters in issue in the actions." Fed.R.Civ.P. 42(a). Trial courts retain "broad discretion to determine whether consolidation is appropriate." *Johnson v. Celotex Corp.,* 899 F.2d 1281, 1284-85 (2d Cir.1990). That discretion, however, "is not unfettered." *Id.* at 1285. In deciding whether to grant a motion to consolidate, courts must

consider

> [w]hether the specific risks of prejudice and possible confusion [are] overborne by the risk of inconsistent adjudications of common factual and legal issues, the burden on parties, witnesses, and available judicial resources posed by multiple lawsuits, the length of time required to conclude multiple suits as against a single one, and the relative expense to all concerned of the single-trial, multiple-trial alternatives.

Id. (alteration in original) (quoting *Hendrix v. Raybestos-Manhattan, Inc.,* 776 F.2d 1492, 1495 (11th Cir.1985)). Consequently, considerations of "convenience and economy" must yield to "a paramount concern for a fair and impartial trial." *Malcolm v. National Gypsum Co.,* 995 F.2d 346, 350 (2d Cir.1993) (quoting *Celotex,* 899 F.2d at 1285). Despite common questions of law or fact, "[w]here confusion and prejudice will result, it is inappropriate for a court to order consolidation." *Tucker v. Arthur Andersen & Co.,* 73 F.R.D. 316, 317 (S.D.N.Y.1976).

The party moving for consolidation bears the burden of showing the commonality of factual and legal issues in the actions it seeks to consolidate. *DeBruyne v. National Semiconductor Corp. (In re Repetitive Stress Injury Litig.),* 11 F.3d 368, 373 (2d Cir.1993), *reh'g granted,* 35 F.3d 637 (2d Cir.1994), *and reh'g denied,* 35 F.3d 640 (2d Cir.1994) (per curiam). Plaintiffs have met their burden of demonstrating the existence of common legal questions in the three actions sought to be consolidated. *See* discussion *supra* Part II.B.2. Though such questions do not predominate, *see* discussion *supra* Part II.D.1, the facts underlying each case are relevant to the determination of those questions and it is likely that some efficiency of judicial and other resources would be achieved by consolidating these actions.

Defendants-most of whom are represented by the same law firm in each of the three actions sought to be consolidated-argue against consolidation only as an afterthought, and in the most general terms. (*See* Defs.' Mem. Law Opp'n Pls.' Mot. Class Certif. & Consol. at 23-24.) The Port Washington Defendants argue that there is "a great risk that the actions of the Nassau County Defendants will be imputed to, or confused with, those of the P[ort] W[ashington] D [efendants]" and that "the potential for confusion between the policies in Nassau County and that of the Port Washington Police District would be difficult to avoid." (Port Wash. Defs.' Mem. Law at 8.)

***16** Defendants and Port Washington Defendants fail to substantiate their fears with any specific examples, and the Court sees no reason why any risk of confusion or prejudice could not be eliminated at trial with well-crafted jury instructions. *See Consorti v. Armstrong World Indus., Inc.,* 72 F.3d 1003, 1008 (2d Cir.1995) (risk of confusion or prejudice avoided in consolidated action where district court used "intelligent management devices" such as thoughtful verdict forms and cautionary and limiting instructions), *vacated on other grounds sub nom. Consorti v. Owens-Corning Fiberglas Corp.,* 518 U.S. 1031 (1996). *But cf. Baker v. Waterman S.S. Corp.,* 11 F.R.D. 440, 440-41 (S.D.N.Y.1951). It should be remembered that consolidation "does not merge the suits into a single cause, or change the rights of the parties, or make those who are parties in one suit parties in another." *Primavera Familienstiftung,* 173 F.R.D. at 130 (quoting *Johnson v. Manhattan Ry. Co.,* 289 U.S. 479, 496-97 (1933)). Nonetheless, if the parties can demonstrate, in specific terms, with citation to authority, a real risk of confusion or prejudice if these cases are tried in consolidated fashion, the Court will revisit this issue.

IV. APPOINTMENT OF LEAD COUNSEL

The Court denies without prejudice so much of Plaintiffs' motion as seeks appointment of Herbst & Greenwald LLP as lead counsel in this consolidated action. Although the Court could appoint lead counsel in these consolidated cases even in the absence of a certified class action, *see, e.g., Rando v. Luckenbach S.S. Co .,* 25 F.R.D. 483 (E.D.N.Y.1960), the Court is reluctant to do so, in part because it appears that the application for appointment as lead counsel anticipated a certified class action, in part because the *O'Day* Action plaintiff has not consented to such relief, and in part because the plaintiffs in the three actions are represented by attorneys in just four law firms, who should be quite capable of coordinating the conduct of the proceedings amongst themselves. *Cf . Fields v. Wolfson,* 41 F.R.D. 329, 330 (S.D.N.Y.1967). Plaintiffs may renew their application for appointment of lead counsel, however, if circumstances develop that indicate the desirability or necessity for such appointment. *See id.*

V. CONCLUSION

For the foregoing reasons, Plaintiffs' motion is GRANTED IN PART to the extent it seeks consolidation of the above-captioned action with case Nos. 99-CV-2844 and 99-CV-4238 for all purposes, DENIED IN PART to the extent it seeks certification of a unified class action and appointment of class counsel, and DENIED IN PART

WITHOUT PREJUDICE to renew to the extent it seeks appointment of Herbst & Greenwald LLP as lead counsel; and

IT IS ORDERED that the parties in the erstwhile unconsolidated cases shall endeavor to file a Stipulation and Order of Consolidation within 30 days after the date of this Memorandum Opinion and Order setting forth the details of consolidation, but that if the parties are unable or unwilling to so stipulate, then Plaintiffs' counsel shall serve and file in its stead a Proposed Order of Consolidation, and the remaining parties may serve and file within 10 days after service thereof letter submissions proposing appropriate changes thereto; and

***17** IT IS FURTHER ORDERED that THE CLERK OF COURT shall docket and file this Memorandum Opinion and Order not only in case No. 99-CV-3126, but also in case Nos. 99-CV-2844 and 99-CV-4238, and shall mail copies hereof to the parties in each of these three actions.

SO ORDERED.

Footnotes

1 The difference between an "injunctive class" under Rule 23(b)(2) and a "damages class" under Rule 23(b)(3) is that when a class action is certified under Rule 23(b)(2), all persons who come within the description of the class become, and must remain, members of the class because no opt-out provision exists. When an action is certified under Rule 23(b)(3), on the other hand, class members are entitled to notice of the pendency of the action and may elect to "opt out" of the class and thereby not be bound by the judgment rendered therein. *See Daniels v. City of New York,* No. 99-CV-1695, ____ F.R.D. ____, ____, 2001 WL 62893, at *5 (S.D.N.Y. Jan. 25, 2001).

2 Although Port Washington Defendants contend that the numerosity requirement has not been met as to them, (Port Wash. Defs.' Mem. Law at 13), it is unnecessary to address Port Washington Defendants' argument on that point to resolve Plaintiffs' motion. Further, the Court does not address any of Port Washington Defendants' arguments herein except as necessary to resolve Plaintiffs' motion.

3 Neither Defendants nor the Court question the qualifications, experience, or ability of the proposed class and lead counsel, which are set forth in Plaintiffs' moving papers. (Aff. Supp. Pls.' Mot. Consol. & Class Certif. ¶¶ 15-17; Mem. Law Supp. Pls.' Mot. Consol. & Class Certif. at 22-23.)

4 By "dignitary harm," the Court means injury the result of a "dignitary tort" as that term has been used to describe a claim under § 1983 for which, under *Memphis Community School District v. Stachura,* 477 U.S. 299, 308 n.11 (1986), a plaintiff may recover only nominal damages in the absence of proof of actual injury. *See* 2 Dan B. Dobbs, *Law of Remedies* § 7.4(1)-(2) (2d ed.1993); *see, e.g., Ruggiero v. Krzeminski,* 928 F.2d 558, 563-64 (2d Cir.1991) (upholding district court's entry of nominal damages award in § 1983 action where the jury found a Fourth Amendment violation but did not award actual damages); *Hunter v. Auger,* 672 F.2d 668, 677 (8th Cir.1982) (directing the district court to allow nominal damages for a Fourth Amendment violation resulting from strip searches of relatives visiting prisoners at state penitentiary where there was no showing of actual damages).

5 The first question is certainly a "common" one in the sense that it is common to any lawsuit filed in this district against which a Rule 12(b)(6) motion has been made. But it is not common, of course, to the merits of any cause of action brought by Plaintiffs or otherwise. Although the *Shain* decision appears likely to have some kind of class-wide significance, the Court is unsure what the Plaintiffs intend by their second question; whether *Shain* has res judicata value, offensive or defensive collateral estoppel value on certain elements, or merely precedential value, has not yet been addressed in any degree of specificity by the parties. Finally, to the extent the effects of the PLRA would only impact certain plaintiffs, the seventh question raises the spectre of individualized standing determinations, not determinations that are common to all members of the putative class.

6 The Court considers the individualized questions raised by Defendants concerning whether particular plaintiffs will satisfy the class definition to be more appropriately addressed as questions of class specificity, *see Daniels,* 198 F.R.D. at ___, 2001 WL 62893 at *4, or class manageability under Rule 23(b)(3)(D), *see Noon v. Sailor,* No. NA99-0056-C-H/G, 2000 WL 684274, at *3-4 (S.D.Ind. Mar. 14, 2000), *recons. denied,* 2000 WL 684219 (S.D.Ind. Apr. 17, 2000), not predominance under Rule 23(b)(3).

7 In a later decision, the court in *Gary* addressed the predominance question in a more expansive manner in denying the defendant's motion to decertify the class. *See Gary v. Sheahan,* No. 96-C-7294, 1999 WL 281347 (N.D.Ill. Mar. 31, 1999) [hereinafter *"Gary II"*], *appeal dismissed,* 188 F.3d 891 (7th Cir.1999), *reh'g and reh'g en banc denied, id.*

8 Inasmuch as the conclusion in *Klein* rested on additional factual considerations that do not appear to be present in this action, the force of its conclusion as applied to this case is blunted. On the other hand, its reasoning as to the individualized inquiry of a plaintiff's "emotional constitution" fully applies.