The Honorable Barbara J. Rothstein

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

ROBERT HICKEY, KENNETH HANKIN, JENNIFER HUDZIEC, STEPHANIE LANE, CARROLL JACKSON, DENISE COOPER, NICOLE PEARSON, and EMILY MALONEY, on behalf of themselves and all others similarly situated,

Plaintiffs,

v.

THE CITY OF SEATTLE, a municipality; PAUL SCHELL, Mayor of the City of Seattle; and NORMAN STAMPER, Chief of Police of the City of Seattle,

Defendants.

No. C00-1672 R

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

Noted for Hearing: October 11, 2002

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TABLE OF CONTENTS

1301 FIFTH AVENUE, SUITE 2900 • SEATTLE, WA 98101
TELEPHONE (206) 623-7292 • FACSIMILE (206) 623-0594

TABLE OF AUTHORITIES

CASES

1301 FIFTH AVENUE, SUITE 2900 • SEATTLE, WA 98101
TELEPHONE (206) 623-7292 • FACSIMILE (206) 623-0594

1301 FIFTH AVENUE, SUITE 2900 • SEATTLE, WA 98101
TELEPHONE (206) 623-7292 • FACSIMILE (206) 623-0594

I. INTRODUCTION

Defendants' opposition is notable for what it concedes: that on December 1, 1999, the City of Seattle arrested more than 140 individuals at or near the intersection of First Avenue and Broad Street for entering the No-Protest Zone, a crime they did not commit. Defendants do not dispute that police cornered a large group of people that never entered the No-Protest Zone, and then arrested and booked them on charges of entering the No-Protest Zone, using identical, photocopied arrest records (a "Superform") that listed the same crime, the same place and time of arrest, and the same arresting officer, and omitted any mention of individual circumstances. Defendants treated this class of individuals as a faceless group of individuals. In so doing, they treated the Class in a uniform and common manner that compels class certification.

Defendants' primary argument in opposition to certification is that there may have been individual circumstances relevant to some arrests. However, ***none*** of the arrest records in question contain ***any*** individual explanation for a particular person's arrest, and Defendants have not even attempted to suggest how they would prove individual circumstances. Even supposing they could muster such evidence, courts have held that such inquiries do not defeat certification. *See, e.g., Maneely v. City of Newburgh*, 208 F.R.D. 69, 77-79 (S.D.N.Y. 2002) (class certified on allegations that strip-searches had been conducted without probable cause where reasonableness inquiry required for each search); *Abramovitz v. Ahern*, 96 F.R.D. 208, 217 (D. Conn. 1982) (class certified for illegal wiretap victims where inquiry necessary for each tap).

Defendants also raise a number of other issues, such as "vagueness" of the Class definition and adequacy of representation, that are equally groundless.

II. THE MOTION IS NOT UNTIMELY

Defendants suggest Plaintiffs' motion is untimely, apparently contending that this case has a set deadline for class certification. In fact, as Defendants are well aware, there have been ***no*** deadlines in this case ever since the Court vacated all deadlines on February 27, 2001. Reply

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Declaration of Tyler S. Weaver in Support Second Motion for Class Certification, ¶ 3 ("Weaver Reply Decl."). Indeed, the parties have in recent weeks discussed the need to set a trial date and associated deadlines. There are no deadlines in this case and Plaintiffs' motion is not untimely.

During those discussions regarding proposed trial and pre-trial dates, Plaintiffs told Defendants they would file a second motion for class certification. Weaver Reply Decl., ¶ 5. Defendants did not respond in any fashion to Plaintiffs' declared intentions and did not object on the basis that such a motion would be untimely. *Id*.

In any event, a motion for class certification should not be denied on grounds of timeliness except where a defendant has been prejudiced. *See, e.g., Stolz v. United Brotherhood of Carpenters & Joiners, Local Union No. 971*, 620 F. Supp. 396, 402 (D. Nev. 1985). Defendants have not demonstrated any prejudice, nor could they where there is no case schedule. The timing of present motion reflects the evolution of this case following the Court's summary judgment orders, which eliminated the claims of most Plaintiffs and mooted the first motion for class certification. Plaintiffs, with the Court's permission, sought review of the Court's summary judgment order from the Ninth Circuit, which request was only recently denied. Plaintiffs have brought this second motion for certification of a subgroup of the original class. Any delay has not prejudiced Defendants, who have always known that Plaintiffs sought to represent a class.[1]

III. THE COURT SHOULD NOT CONSIDER THE MERITS ON THIS MOTION

Defendants' have invited the Court to consider the merits of the Class's claims in deciding this motion. However, there is "nothing in either the language or history of Rule 23 that gives a court any 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. Indeed, such a procedure contravenes the Rule." *Eisen v. Carlisle & Jacquelin*, 417 U.S. 156, 177 (1974). The Court should decline Defendants' invitation to render a ruling on the merits of the Class's claims.

[1] Defendants claim that they were not previously on notice that the Plaintiffs arrested outside the No-Protest Zone had stated or would state a claim that their arrests were unlawful. That is not the case. *See, e.g.,* Amended Complaint, ¶ 10, Ex. 4 to Weaver Reply Decl.

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IV. THE CLASS IS DEFINED CLEARLY

Defendants object to the Class definition as being allegedly "vague." However, Defendants' objections are easily refuted. Indeed, Defendants' actually concede that "the putative members of the proposed class can be . . . easily identified." Opp. at p. 12.

The proposed Class definition is highly specific:

> All individuals arrested on December 1, 1999, in the vicinity of the intersections of First Avenue and Broad Street or First Avenue and Clay Street in Seattle, Washington, whose arrest records indicate that a reason for arrest was a violation of Seattle Municipal Code § 12A.26.040.

Defendants' objections to this definition boil down to mere semantics. Yet, "[w]hile the definition of the class must not be vague or difficult to apply, the implicit definition requirement does not require an overly strict degree of certainty and is to be liberally applied." *Singer v. AT&T Corp.*, 185 F.R.D. 681, 685 (S.D. Fla. 1998).

Defendants' first argument is that the use of the word "vicinity" is vague.[2] In fact, it is not vague at all in context. The members of the Class were arrested *en masse* in a multi-block area that included First Avenue's intersection with Broad and Clay Streets. As the sample arrest records Plaintiffs submitted with their motion demonstrate, each Class member's "Superform" indicates that the "location" of arrest was "1st & Broad to 1st & Denny." *See* Declaration of Tyler Weaver in Support of Second Motion for Class Certification ("Weaver Decl."), Exs. C, D, and G through R. This is the area referred to by Plaintiffs' Class definition. Defendants have not produced a single record of an arrest in the "vicinity" of First and Broad that was not part of the mass arrest at issue. Plaintiffs, who have reviewed what they understand to be all arrest records from December 1, 1999, believe there is no such arrest record.

[2] Defendants incorrectly claim in their discussion of the class definition that Plaintiffs have impliedly alleged a facial challenge to SMC 12A.26.040. Opp. at 7. That is not the one of the Class claims.

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Defendants also claim that "arrest" is vague. The Class definition uses "arrest" as it is commonly used – to refer to the act of taking someone into police custody. All of the Class members were taken into police custody. "Arrest" does not render the definition vague.

Defendants also claim that the use of the phrase "arrest record" is vague. Reference to the context of Plaintiffs' motion shows that this term is not vague. By "arrest record," Plaintiffs are referring to each Class member's Superform, on which Seattle police recorded information on each arrestee. *See, e.g.*, Weaver Decl., Exs. C, D, and G through R. By "arrest record," Plaintiffs are referring primarily to these Superforms. It is readily apparent from these records what charges each Class member was booked on and when and where they were arrested.

Defendants also complain the Class includes individuals who were booked on offenses in addition to a violation of SMC 12A.26.040. This does not render the definition vague. As indicated in Plaintiffs' motion (p. 6 at n.2), a portion of the Class was charged with obstructing an officer in addition to violating SMC 12A.26.040. However, those charges arose from a ***post-arrest*** refusal to exit a bus. *See* Weaver Decl., ¶ 5 and Ex Q. This additional charge would not – could not – have been brought if the Class members had not been wrongfully arrested. Any charges for ***post-arrest*** behavior are irrelevant to the Class's claims for wrongful arrest.

The Superforms for a handful of Class members also indicate that they were booked on charges of failing to disperse in violation of SMC 12A.12.020, in addition to violating SMC 12A.26.040. *See* Weaver Decl., ¶ 6, Ex. Q. However, a review of the entire arrest record for these Class members shows that they were arrested for the same reasons and under the same circumstances as the rest of the Class. *See id.*

Defendants also claim the Class includes "individuals arrested for acts of property destruction, assault, threatening the President, and endangering the public." Opp. at 8. That is not so. Plaintiffs submitted a table that shows what each Class member was charged with. *See* Weaver Decl., ¶¶ 2 and 3, and Ex. B. No Class member was charged with any such crimes.

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Defendants further complain that the Class does not explicitly exclude individuals who have already litigated claims against Defendants for their wrongful arrests. Any such individuals would be, of course, necessarily excluded from the Class.

Defendants also claim that the Class is "vague" because it is not limited to those arrested by a Seattle police officer. However, the Superform for ***every*** Class member lists the "arresting officer" as "Lt. Black" of the Seattle Police Department. *See, e.g.*, Weaver Decl., Exs. C, D, and G through R. If there were different arresting officers, Defendants failed to note as such, and have not provided any evidence that the mass arrest at issue involved anyone other than Seattle officers. Even if a Class member was arrested by an officer from a different jurisdiction, Defendants would be liable for that officer's acts while acting at the direction of Seattle officers. *See, e.g., Sheimo v. Bengston*, 64 Wn.App. 545, 550, 825 P.2d 343 (1992) (city liable for actions of county officers working under city's direction). *See also* Weaver Decl., Exs. A and S (documenting that Seattle Captain James Pugel directed the mass arrest).

Defendants also argue that the Class definition is insufficient because it would require inquiry into 1) when a person was arrested, 2) where the person was arrested, 3) the arresting officer, 4) whether the person was arrested for violating SMC 12A.26.040, and 5) whether the individual filed a claim with the City. As for the first four of these points, all of this information is easily gleaned from each person's Superform. As for the final point, it is an issue of law common to the Class whether any Class member was required to file a claim with the City. *See, e.g., Wilson v. City of Seattle*, 122 Wn.2d 814, 819, 863 P.2d 1336 (1993).[3]

If the Court is concerned that the definition is imprecise, Plaintiffs request the Court allow Plaintiffs to rewrite the definition to address the Court's concerns.

V. THE CLASS SATISFIES THE REQUIREMENTS OF RULE 23(A)

Contrary to Defendants' arguments, the Class satisfies all elements of Rule 23(a).

[3] Defendants also argue that individual issues are invited into this case by claims of excessive force. Plaintiffs have not stated claims of excessive force.

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A. Joinder Would be Impracticable

Defendants claim that the joinder of more than 140 Class members would not be impracticable. That is simply incorrect. Contrary to Defendants' argument, impracticability under Rule 23(a)(1) can be proven by the size of the Class alone, and 140 Class members is sufficient. *See, e.g.*, *Stewart v. Abraham*, 275 F.3d 220, 226-27 (3d Cir. 2001), *cert. denied*, 122 S. Ct. 2661 (2002) (classes of 40 or more routinely certified); *Gay v. Waiters' & Dairy Lunchmen's Union*, 549 F.2d 1330, 1332 n.7 (9th Cir. 1977) (110 is "clearly sufficient").

Even if the sheer size of the Class were not enough to establish impracticability, Rule 23(a)(1) is also satisfied where "the difficulty or inconvenience of joining all members of the class makes class litigation desirable." *Int'l Moulders' & Allied Workers' Local Union No. 164 v. Nelson,* 102 F.R.D. 457, 461 (N.D. Cal. 1983). Geographical diversity and relatively small damages claims both suggest that joinder would be impracticable. *Jordan v. County of Los Angeles*, 669 F.2d 1311, 1319-20 (9th Cir. 1982), *vacated on other grounds*, 459 U.S. 810 (1982). Here, the individual damage claims are not particularly large, and, as Defendants point out, "as these [Class members] may have come from all over the world, plaintiffs will have considerable difficulty in accessing these putative class members . . . ." Opp. at 23. Joinder of over 140 people with relatively small claims who live across the country would be especially difficult, as well as unmanageable for this Court. Joinder would be impracticable.

B. There Are Numerous Common Issues of Law and Fact

Defendants claim that there are no common issues of law or fact. That is incorrect. Defendants do not dispute that every member of the Class was arrested in a group, at the same time, on the same day, in the same place, pursuant to the same arrest order, and was booked the same offense for the same reason, using photocopied arrest records that are virtually indistinguishable. This creates an entire host of common factual and legal issues, including why police ordered a mass arrest without concern for probable cause, and whether Plaintiffs were

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arrested for a crime they did not commit. Indeed, Seattle Police Captain James Pugel, who was in charge of the mass arrest, testified that every arrest record from the mass arrest is ***wrong***:

> A. [Reading photocopied arrest record from First and Broad mass arrest:] "Suspect arrested after refusing to leave area." Okay. The first sentence, "Suspect failed to clear street in area of First and Broad to First and Denny in accordance with Mayoral Order."
>
> Q. Do you know what Mayor order that was?
>
> A. No.
>
> Q. Was there any Mayor's order governing that?
>
> A. ***That was clearly a misstatement by the person that wrote this report.***

Weaver Decl., Ex. A at pp. 281-82 (emphasis added). This "misstatement" appears in ***every*** arrest record for ***every*** Class member.[4] There are thus obvious common issues of fact and law. These include whether the order to arrest all Class members without consideration of probable cause violated the First and Fourth Amendments, why the arrest order was given, whether the City had a policy of arresting all protestors regardless of whether they were inside or outside the No-Protest Zone, and whether any such policy violated the First and Fourth Amendments. All that Rule 23(a)(2) requires is that there is "a common issue of law or fact." *Blackie v. Barrack*, 524 F.2d 891, 904 (9th Cir. 1975). That rule is satisfied here.

The supposed individual issues Defendants identify are nothing more than attempts to suggest there may have been individual circumstances for each arrestee – something never claimed when the arrests were made. Not a single Class member's arrest record contains any description of individual circumstances. *See* Weaver Decl., ¶¶ 3-6, Exs. C, D, and G through R. Nearly 3 years after the mass arrest, Defendants now make the dubious claim that they may have had cause to arrest Class members for other crimes. However, even if Defendants could attempt to prove a different basis for arrest at this late stage, Defendants are attempting to delve into the merits of the case, which is improper on this motion.

[4] There is but a single exception. One of the arrest records Plaintiffs have reviewed does not contain the sheet Capt. Pugel testified about, but that record also does not give any other reason for arrest. Weaver Decl., ¶¶ 4,5.

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TELEPHONE (206) 623-7292 • FACSIMILE (206) 623-0594

In any event, even if probable cause inquiries were required, that does not mean that there are no common issues, and does not defeat class certification. Other courts have certified classes that presented the possibility of far more individualized inquiries than would ever be necessary here. *See, e.g.*, *Maneely*, 208 F.R.D. at 77-79 (class certified on allegations that strip-searches had been conducted without probable cause even where circumstances of each search required reasonableness inquiry); *Arrington v. City of Philadelphia*, 1989 U.S. Dist. LEXIS 19117, at *10-*12 (E.D. Pa. 1989) (class of 400 individuals stopped in investigation even though individual inquiries required for each stop).[5] Furthermore, Defendants will bear the burden of proving the existence of probable cause. *See, e.g. State v. Mance*, 82 Wn.App. 539, 544-45, 918 P.2d 527 (1996); *Schnepp v. Hocker*, 429 F.2d 1096, 1099 n.5 (9th Cir. 1970). Yet Defendants have not indicated how they plan to carry that burden for any Class member, or whether there is ***any*** proof of individualized determinations of probable cause for any Class member. The arrest records for the Class certainly do not provide any such proof – they provide the ***exact same explanation for every Class member's arrest***.

Defendants' suggested "alternative" offenses are entirely speculative and conveniently overlook the undisputed facts. Defendants suggest that the Class members could be charged with (1) blocking traffic, (2) congregating with others so as to block traffic, or (3) conducting a parade without a permit. These offenses have no factual basis; it is undisputed that Class members attempted to leave the area but were stopped by the police. *See* Second Motion at 3-5.[6]

Defendants also discuss at length the fact that Plaintiffs Hickey and Jackson were not herded with other Class members before being arrested. It is true that members of the Class likely arrived at First and Broad under slightly different circumstances, some being herded,

[5] For the Court's convenience, all unpublished authorities cited herein are attached to this motion as an Appendix In Support of Plaintiffs' Reply Memorandum in Support of Second Motion for Class Certification.

[6] In addition, it must be noted that all of the suggested alternative offenses would either apply to the entire Class or not at all. If any Class member could have been arrested for blocking traffic, then all of the Class members could have been arrested for the same crime because they were corralled in the same area. In addition, the other suggested alternative offenses – congregating and conducting a parade without a permit – are necessarily group offenses that would apply to the entire Class or not at all. There can be no one-person parade or congregation.

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others not, but that does not change the fact that they were all – including Plaintiffs Hickey and Jackson – arrested *en masse* without any concern for those individual circumstances, at the same location, the same time, under the same order, and for the same erroneous reason.

Defendants also suggest the Court would have to perform individual inquiries as to whether a particular person was engaging in protected "speech" or "assembly" for the purposes of the First Amendment. However, even assuming that is an accurate statement of law, it does not mean that the Class does not satisfy the commonality requirement. In any event, whether or not the Class members were engaged in protected "speech" or "assembly" at the time of arrest is a question of law and fact common to the Class because they were all in the same group and the same location at the time of arrest, and the question of whether Defendants arrested the Class for exercising their rights will also be a common issue. Furthermore, Defendants' claim that the mass arrest at issue might involve "a reasonable time, place, and manner restriction" creates yet another common issue – was the order to arrest the Class members such a restriction?

C. Plaintiffs Hickey and Jackson's Claims Are Typical of the Class

Defendants claim that Plaintiffs Hickey and Jackson's claims are not typical of the Class because they were not herded before being arrested. This is incorrect. "The test of typicality refers to the nature of the claim . . . of the class representative, and ***not to the specific facts from which it arose*** . . . ." *Jones v. Shalala*, 64 F.3d 510, 514 (9th Cir. 1995) (emphasis added). The focus is on whether the representatives have the same claims, and rely on the same legal theory, as the rest of the Class. *See Hanon v. Dataproducts Corp.*, 976 F.2d 497, 508 (9th Cir. 1992). Plaintiffs Hickey and Jackson clearly satisfy the standard. Like every other Class member, they were arrested at or near First and Broad on December 1, 1999, without probable cause, for allegedly entering the No-Protest Zone. Their arrest records are for all intensive purposes identical to those of every Class member (Compare Weaver Decl., Exs. C and D, and G through R), and their claims rest on the exact same legal theory as the rest of the Class members' claims.

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D. Plaintiffs Hickey and Jackson Are Adequate Representatives

Defendants argue that Hickey and Jackson are not adequate representatives because they cannot advance the costs of litigation. However, Plaintiffs have more than sufficient resources to represent the Class. Weaver Reply Decl., ¶ 6. *See also Rand v. Monsanto Co.*, 926 F.2d 596, 599-600 (7th Cir. 1991) (resources of counsel can serve to establish adequacy).

VI. THE CLASS SATISFIES THE REQUIREMENTS OF RULE 23(B)(3)

A. Common Questions Predominate

Defendants claim that the Class falls short of the requirements of Rule 23(b)(3) because individual issues would predominate in this case. However, their argument is baseless. The "predominance" requirement is satisfied wherever "common questions present a significant aspect of the case and may be resolved for all members of the class in a single adjudication." *See Hanlon v. Chrysler Corp.*, 150 F.3d 1011, 1022 (9th Cir. 1998). Common legal and factual issues dominate the claims of the Class. There are numerous common factual and legal issues, many of which are outlined in Plaintiffs' motion as well as Section V.B, above.

In contrast, the individual issues Defendants focus on are either not issues at all, or are secondary to the common issues. For example, Defendants' claim that identification of the Class would require significant individual inquiry is groundless. *See* Section IV, above. Similarly, Defendants' argument that issues regarding probable cause, reasonableness, and other individual circumstances giving rise to arrest present too many individual issues are pure speculation. *See* Section V.B, above. Defendants did not note any individual circumstances at the time of arrest. Also, Defendants' arguments regarding free-speech serve only to raise common issues. *Id.*

This case is similar to a number of cases in which courts have found that because a defendant arrested or searched a large group of people for the same reason, common issues predominated over any issues concerning the particular circumstances of individual arrests. In *Maneely,* for example, plaintiffs alleged the defendant had a policy of strip-searching inmates without probable cause. Even though the claims required a case-by-case analysis, the court

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found that the common questions concerning the constitutionality of the defendants' policy predominated because the need for inquiries was merely a problem of manageability. *See* 208 F.R.D. at 76-78. Similarly, in this case, even assuming that Defendants can substantiate their bald assertion that there are individualized defenses to each arrest, common issues predominate, particularly the common issues of whether the City had a policy to arrest all protesters regardless of whether they were in the No-Protest Zone (and the constitutionality of such a policy) and whether the order to arrest all Class members without regard to probable cause was constitutional. *See also, e.g., Patrykus v. Gomilla*, 121 F.R.D. 361, 363 (N.D. Ill. 1988) (where police entered bar and arrested or searched 50 people in single incident, common issues predominated); *Abramovitz*, 96 F.R.D. at 217 (in case alleging illegal wiretaps, common issues predominated even where inquiry necessary for each tap); *Cliett v. City of Philadelphia*, 1985 U.S. Dist. LEXIS 14832, at *5-*6 (E.D. Pa. 1985) (where defendants searched 1400 people, common issues of constitutionality predominated despite need for inquiry into each arrest).

Defendants' reliance on *In re Dalkon Shield IUD Prods. Liab. Litig.*, 693 F.2d 847 (9th Cir. 1982) is misplaced. Individual issues predominated in that case, which alleged damages from an interuterine device, because the claims required deep inquiry into the medical history of each Class member to determine causation and harm. *Id.* at 853. The case is easily distinguished. All Class members were subject to the same mass arrest in a single incident, and the cause of each arrest was the same – a single arrest order given by the Seattle police.

B. A Class Action Would be Superior

Defendants also claim that a class action would not be superior, yet their arguments are thin. Defendants claim that the fact that only two plaintiffs would be class representatives would render litigation procedurally difficult. However, they do not indicate why that would be. Plaintiffs have confidence that the Court and parties can manage both class and non-class claims.

Defendants also claim that the paucity of previous litigation over the mass arrest indicates a class action would not be proper. However, Rule 23(b)(3)(B), which indicates that the

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existence of other suits is relevant, is intended to avoid conflicts with other suits already filed, not to deny class certification because other suits have not been filed. *See Zinser v. Accufix Research Inst., Inc.*, 253 F.3d 1180, 1191 (9th Cir.), *as amended*, 273 F.3d 1266 (2001).

Defendants also, finally, suggest that the fact that the Class is geographically diverse indicates that a class action would be inferior. To the contrary, the fact that the Court could bring the common claims of a geographically diverse group together in a single forum, rather than risk suits being brought across the country, indicates that a class action is superior.

VII. THE CLASS ALSO SATISFIES RULE 23(B)(2)

Defendants claim the Class cannot be certified under Rule 23(b)(2) because Plaintiffs seek damages. This argument fails because Plaintiffs seek a hybrid class, with certification of their damages claims under Rule 23(b)(3). As the Seventh Circuit has recognized:

> The district court could certify a Rule 23(b)(2) class for the portion of the case addressing equitable relief and a Rule 23(b)(3) class for the portion of the case addressing damages. This avoids the due process problems of certifying the entire case under Rule 23(b)(2) by introducing the Rule 23(b)(3) protections of personal notice and opportunity to opt out for the damages claims.

Lemon v. International Union of Operating Eng'rs, Local No. 139, 216 F.3d 577, 581 (7th Cir. 2000). *See also Patrykus v. Gomilla*, 121 F.R.D. at 363 (certifying (b)(2) and (b)(3) classes over objection that "the substantial damages sought preclude certification under Rule 23(b)(2)").

The City also argues that (b)(2) certification is inappropriate because Plaintiffs cannot demonstrate a "common policy." That is not the case. The "common policy" with regard to the Class was, of course, the single order to arrest all of them for something they did not do. [7]

VIII. CONCLUSION

Plaintiffs satisfy the prerequisites of Rule 23(a), and meet the requirements of Rule 23(b)(3) and (2). The Court should certify a Rule 23(b)(3) class. Alternatively, the Court should certify a hybrid class that includes an opt-out class under Rule 23(b)(3) for damages claims.

[7] Plaintiffs also note that there is a common issue of whether Defendants maintained a common policy that all protesters were subject to arrest, regardless of whether they were in the No-Protest Zone.

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