

UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF NEW YORK

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In Re:

NASSAU COUNTY STRIP SEARCH CASES  
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THIS DOCUMENT RELATES TO:

AUGUSTIN, No. 99-CV-3126  
IAFFALDANO, No. 99-CV-4238  
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Master File No.  
99-CV-2844 (DRH)(ARL)

**MEMORANDUM & ORDER**

*Esther Miller, general litigation supervisor*

Defendants have filed a motion to “clarify” their previous concession of liability. In response, Plaintiff’s have filed a cross-motion to certify a class pursuant to Federal Rules of Civil Procedure 23(a), 23(b)(2) and 23(b)(3). For the following reasons, the Court grants Defendants’ motion and denies Plaintiffs’ motion.

I. DEFENDANTS’ MOTION TO “CLARIFY” THE PREVIOUS CONCESSION OF LIABILITY.

To render the circumstances of the instant cross-motions clear, the Court must provide some procedural background to this case. All of the following facts are derived from the undisputed procedural background of the instant case.

On May 20, 1999, the first of these three consolidated putative class action cases, Francis O’Day, et al. v. Nassau County, et al. (99-CV-2844), was initiated by filing a complaint. This complaint sought equitable relief and damages due to a strip search policy utilized by the Nassau County Correctional Center (“NCCC”). As alleged in this complaint, NCCC’s strip search policy was applied to all individuals charged with misdemeanors and minor offenses, regardless of any specific factual circumstances. On June 1, 1999, Judge Wexler, in Shain v. Ellison, 53 F. Supp. 2d 564 (E.D.N.Y. 1999), aff’d. in relevant part, 273 F.3d 56 (2001), held that “[t]he policy of strip searching all misdemeanor and minor offense arrestees remanded to the NCCC, without requiring any suspicion that the remanded individual is concealing weapons or other contraband,

violates the Fourth Amendment to the United States Constitution.” 53 F. Supp. 2d at 568. The other two complaints relevant to the instant action were filed after Judge Wexler’s ruling. The Court now considers all of the complaints.

The amended complaint in Francis O’Day (99-CV-2844), was filed on August 24, 1999. In that complaint, the named plaintiffs sought monetary and injunctive relief due to (1) Defendants’ policy of strip searching all non-felony admits to the NCCC and also (2) due to Defendants alleged policy of strip searching all persons who have posted bail, or who have otherwise been deemed releasable by a court, and who are then strip searched again upon their return from court. See O’Day Amended Complaint ¶ 2. The amended complaint also alleges a “policy practice and custom” of unconstitutionally delaying in releasing individuals who have already posted bail or are otherwise deemed “releasable.” Id. ¶ 3.

The amended complaint in Gardy Augustin, et al., v. Joseph Jablonsky, et al. (99-CV-3126), the second initiated of the consolidated actions, seeks money damages and injunctive relief for Defendants’ purported policy of searching non-felony-charged individuals when they are admitted to NCCC. See Augustin Amended Complaint ¶¶ 3, 8-21. This amended complaint does not allege causes of action for either searches at other points during detention or for any delays in being released.

Finally, the amended complaint filed in Iaffaldano v. The County of Nassau, et al. (99-CV-4238), seeks money damages and injunctive relief from Defendants’ purported

policy of searching non-felony-charged individuals when they are admitted to NCCC. See Iaffaldano Amended Complaint ¶¶ 4-6. This amended complaint targets the routine strip searches that were conducted upon and during admittance to the NCCC. See id. ¶ 34. No claims are made for delays in being released.

After the Shain decision, the Court received a motion to consolidate all of the above captioned cases and to certify a class. The class definition suggested by Plaintiffs at that time embraced "all persons arrested for or charged with non-felony offenses who have been admitted to the [NCCC] and strip searched without particularized reasonable suspicion." On March 8, 2001 the Court granted the motion for consolidation and denied Plaintiffs' motion for class certification. See Augustin v. Jablonsky, No. 99-CV-3126, 2001 WL 770839 (E.D.N.Y. March 8, 2001) ("March 8 Order"). In that order the Court held, inter alia, that the proffered class definition would cause individual issues to substantially predominate over all common issues, thereby rendering class certification inappropriate. The Court denied reconsideration in a May 23, 2001 Memorandum Opinion and Order ("May 23 Order"). Plaintiffs' subsequent interlocutory appeal was denied by the Second Circuit.

On September 23, 2003, the Court addressed Plaintiffs renewed motion for class certification ("September 23 Order"). In connection with that renewed motion, Plaintiffs revised the definition of their putative class. This proposed class definition included

all persons arrested for misdemeanors or non-criminal offenses in Nassau County who thereafter were strip[-]searched at the [NCCC] pursuant to

defendants' blanket policy, practice and custom which required that all arrestees be strip-searched upon admission to the facility . . . . [This definition shall not] include individuals who were strip[-]searched after Judge Wexler's June 1, 1999[,] decision in Shain v. Ellison, 53 F. Supp. 2d 564 (E.D.N.Y. 1999), aff'd, 273 F.3d 56 (2d Cir. 2001), cert. denied, 123 S.Ct. 672 (December 9, 2002) . . . .

Plaintiffs' Mem. at 2.

However, because Defendants' opposition to Plaintiffs' motion contained certain notable language, the Court did not reach that class definition. The relevant language stated:

[D]efendants concede the existence of the one common issue that might be appropriate for class certification . . . - namely, whether the [NCCC]'s strip search policy during the class period was constitutional. However, in Shain, . . . the Second Circuit held that the NCCC's policy of strip searching persons charged with a misdemeanor and remanded to the facility in the absence of reasonable suspicion that they were carrying weapons or contraband was unconstitutional. Defendants are bound by Shain under the doctrine of collateral estoppel . . . . Given that the constitutionality of NCCC's strip search policy has now been resolved, there is no need to certify a class with respect to that issue.

Defendants' Opp. Mem. at 8 (citations and footnotes removed)

The Court read this language "as a concession of liability as to the named Plaintiffs (and, presumably, as to all others similarly situated) except to the extent that some corrections officers may have searched some plaintiffs based upon a reasonable and contemporaneously held suspicion rather than pursuant to the blanket strip search policy then in effect." September 23 Order at 5-6 (footnote omitted). However, the Court gave Defendants the opportunity to retract or modify this concession. See id. at 6 n. 2. Despite this clear and unambiguous opportunity, Defendants did not withdraw or otherwise

modify the concession. In fact, they later reaffirmed their concession. On the basis of this concession, the Court found that there were no remaining common disputed issues of fact or law and held that class certification would be inappropriate. The Court later reaffirmed this holding despite Plaintiffs' motion for reconsideration. See October 27, 2003, Order.

The circumstances have since changed. Defendants have since referred the instant case away from their previous counsel; presumably preferring representation by the in-house Nassau County Attorney's Office. This new counsel now seeks to "clarify the previous concession of liability." At first blush, it appeared to the Court that Defendants sought to retroactively alter the basis for the Court's substantive orders in this case. For this reason, in a conference connected with this request to clarify, the Court indicated that Defendants may need to explain why the principle of judicial estoppel would not apply. See United States v. Hussein, 178 F.3d 125, 130 (2d Cir. 1999). Subsequently, the Court issued an order directing Defendants to make a formal motion to clarify the prior concession. One of the issues that the Court directed Defendants to address in their motion was the aforementioned doctrine of judicial estoppel. Upon review of Defendants' clarified concession, which the Court does not consider inconsistent with the prior concession, and the absence of any prejudice to Plaintiffs, the Court concludes that the motion should be granted.

The Court has carefully read Defendants' motion. As set out therein, Defendants' new concession only applies to the blanket strip searches of all non-felony "new admits" to the

NCCC. Defendant do not concede liability as to any other alleged strip search policy. As an initial matter, the Court fails to see how this concession is different than the one that was made in connection with the September 23 Order. The instant concession applies solely to the blanket search policy as it was applied non-felony new admits to NCCC while the concession made in connection with the September 23 Order conceded liability in connection with Shain. Since, as discussed supra, Shain concerned the constitutionality of the policy requiring strip searches of all non-felony admittees to NCCC, the Court cannot divine any substantive difference between the two concessions.<sup>1</sup> Since such a difference is a necessary element for the invocation of judicial estoppel, the Court concludes that this doctrine should not prevent Defendants from the asserting the concession articulated in the context of the instant motion.

Furthermore, the Court notes that it cannot ascertain any prejudice to Plaintiffs flowing from this clarified concession. Indeed, although Plaintiffs express exasperation with the “clarification,” they do not actively oppose Defendants’ motion. Therefore, in light of the observation that the two concessions are substantively identical and the lack of prejudice, the Court accepts Defendants’ clarified concession of liability. For the purposes of clarity, the Court will set forth this concession as follows: the County’s amended concession of liability applies solely to the blanket search policy as it was applied non-felony new admits to NCCC;

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<sup>1</sup>Due to this absence of any substantive difference, the Court cannot ascertain why Defendants felt obligated to clarify their concession, thereby necessitating the instant cross-motions. However, whatever the reasons, Defendants have endeavored to clarify their position.

it does not cover the alleged strip search policy covering all persons who have posted bail or have otherwise been deemed releasable, which is the subject of certain claims by some, although not all, of the named plaintiffs in this consolidated case, see Amended Complaint, Francis O'Day (99-CV-2844).

## II. PLAINTIFFS' MOTION TO CERTIFY A CLASS.

In response to Defendants' application to change their concession, Plaintiffs now renew their motion for class certification with a new proposed class definition. To certify a class pursuant to Rule 23, the putative class members must first establish that the prerequisites of Rule 23(a) have been met and then establish that the action qualifies for certification in accordance with Rule 23(b)(1), Rule 23(b)(2) or Rule 23(b)(3). See In re Visa Check/MasterMoney Antitrust Litigation, 280 F.3d 124, 132-133 (2d Cir. 2001). This requires a rigorous analysis at each step. See Selby v. Principal Mut. Life Ins. Co., 197 F.R.D. 48, 54 (S.D.N.Y. 2000). The Court now considers the proposed class definition in light of these standards.

### A. Plaintiffs' Proposed Class Definition.

Plaintiffs allege a new class definition. This proposed class definition includes "all persons who have or will be arrested for non-felony offenses and admitted to the NCCC." Plaintiffs' Mem. at 5. Plaintiffs indicate that this definition embraces all individuals that were



arrested between May 20, 1996, and the future date of an order from the Court directing Defendants to cease their policy. Finally, Plaintiffs argue that the Court should certify five overlapping subclasses. As presented, the Court is unwilling to accept this definition.

B. Rule 23(a).

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). As currently framed, Plaintiffs' class definition fails to satisfy three of the four prerequisites for class certification.

As an initial matter it is clear that the first prerequisite, sometimes referred to as "numerosity," is satisfied by Plaintiffs' proposed class definition. Defendants do not meaningfully argue that the individuals embraced by the instant proposed class definition fail to satisfy the numerosity requirement. Thus, joinder of the individuals embraced by the suggested class definition would indeed be impracticable. The other three prerequisites to class certification, however, are not satisfied by this definition.

On the face of the proposed class definition, no questions of law or fact are common or typical to all members of the class. These requirements are considered together because

[t]he commonality and typicality requirements tend to merge into one another, so that similar considerations animate analysis of Rules 23(a)(2) and (3). The crux of both requirements is to ensure that "maintenance of a class action is

economical and [that] 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.”

Marisol A. by Forbes v. Giuliani, 126 F.3d 372, 376 (2d Cir. 1997) (citations omitted) (quoting General Tel. Co. of Southwest v. Falcon, 457 U.S. 147, 157 n. 13 (1982)).

To satisfy the commonality requirement, Plaintiffs must establish that their claims share a common question of law or fact. See In re Agent Orange Prod. Liab. Litig., 818 F.2d 145, 166-167 (2d Cir. 1987). The class, as defined, does not share such an issue. This lack of commonality springs from the extremely broad character of the proposed class definition. This is best highlighted by comparing Plaintiffs' proposed subdefinitions. See Plaintiffs' Mem. at 5. By way of illustration the first four subdefinitions involve strip search policies at NCCC while the fifth subdefinition merely embraces those who, under the specific circumstances of each of their individual cases, were delayed in their release from NCCC after being deemed “releasable.” As framed, there is no adequate degree of factual or legal commonality among these subdefinitions, all of which are embraced by the larger proposed class definition. Next, the Court notes that the June 1, 1999, cessation of the new admits policy that resulted in strip searches for the named Plaintiffs obviates any commonality with individuals who were later searched. Thus, as framed, the only commonality lies in the fact that all members were arrested for non-felony crimes. However, this common, and undisputed, arrest history does not set forth an adequate common issue of law or fact.

A class representative's claims are "typical" under Rule 23(a)(3), where each class member's claims arise from the same course of events and each class member makes similar

legal arguments to prove defendants' liability. See Robinson v. Metro-North Commuter R.R. Co., 267 F.3d 147, 155 (2d Cir. 2001). "While it is settled that the mere existence of individualized factual questions with respect to the class representative's claim will not bar class certification, class certification is inappropriate where a putative class representative is subject to unique defenses which threaten to become the focus of the litigation." Gary Plastic Packaging Corp. v. Merrill Lynch, Pierce, Fenner & Smith, Inc., 903 F.2d 176, 180 (2d Cir. 1990) (citation omitted). The individualized fact questions relevant to the instant case have been thoroughly discussed in previous orders. The Court will not address those issues again in the context of the instant motion. Nonetheless, other problems remain with the purported typicality of this class definition. As it stands, the fifth subdefinition details a factual scenario that is not typical of the class members. There is no allegation that there was a policy of delaying people who have been deemed "releasable." Therefore, the instant class definition embraces a claim that could conceivably only embrace the named Plaintiffs who have asserted this claim. Furthermore, the Court notes that the claim for delay in release is atypical even among the named Plaintiffs. For all of these reasons, Plaintiffs have failed to establish typicality for the purposes of the instant class definition.

For all of the reasons discussed supra, the Court concludes that Plaintiffs have not established the requirements set for in Rule 23(a).

C. Timing.

All of the named Plaintiffs were searched pursuant to a strip search policy that ended on June 1, 1999. The proposed class definition, however, encompasses the period between May 20, 1996, and the future date of an order from the Court directing Defendants to cease their policy. As such, the proposed class is currently unbounded in both its size and time. The number of people falling within that proposed class and the circumstances of their cases are practically impossible to predict.

Plaintiffs provide no support for such an unbounded class. The Court is aware that class precision is less important in the Rule 23(b)(2) context. See Anderson v. Coughlin, 119 F.R.D. 1, 3 (N.D.N.Y. 1988). However, both Rule 23(b)(2) and Rule 23(b)(3) class certification is sought by Plaintiffs. Moreover, the instant class is so imprecisely defined that the Court feels it may be unworkable. Finally the Court notes that it is appropriate for the Court to ensure that the class definition is "precise, objective, and presently ascertainable." Nicholson v. Williams, 205 F.R.D. 92, 97 (E.D.N.Y. 2001). For these reasons, the Court concludes that further briefing is appropriate regarding the time limits on the proposed class definition.

D. Additional Problems with the Instant Class Definition.

The Court notes that Plaintiffs again seek class certification for those acts where Defendants have conceded liability. For the reasons discussed in both the Court's September

23 Order and the October 27 Order, the Court declines to certify a class that would include acts for which liability is conceded. Since Plaintiffs' current proposed class definition embraces such conceded causes of action, even under Defendants' amended concession of liability, this definition is framed improperly.

In addition, the Court harbors doubts that the named Plaintiffs are representative of the putative class. Plaintiff's now seek to certify a class, in part, as to individuals that were searched pursuant to an alleged post-Shain policy of searching all non-felony admitees to NCCC. Due to the vintage of the instant case, none of the named Plaintiffs were searched pursuant to that alleged policy. Therefore, it remains unclear whether the named Plaintiff can adequately represent that portion of the proposed class.

Finally, the Court notes that instant class definition embraces individuals that were not included in the prior class definitions. In particular, the Court notes that a class based upon delays in being released are wholly inconsistent with all of Plaintiffs' prior class definitions. Furthermore, the Court notes that a class embracing searches other than those made upon initial admittance into NCCC, i.e. searches embraced by the facts of the Shain case, is clearly inconsistent with the definition addressed in the September 23 Order. Accordingly, the only truly inconsistent position advanced by the parties in the context of the instant cross-motions comes from Plaintiffs, not from Defendants.

It is unclear what consequences flow from the fact that Plaintiffs' current position is inconsistent with their position during the previous five years of this litigation. However,

inconsistently alleged classes have been found to support the denial of motions to certify classes in other cases. See Cavallo v. Utica-Watertown Health Ins. Co., Inc., 191 F.R.D. 342, 346 (N.D.N.Y. 2000); cf. W. Alton Jones Foundation v. Chevron U.S.A., Inc., 97 F.3d 29, 35 (2d Cir. 1996); Soranno v. New York Life Ins. Co., No. 96-CV-7882, 2001 WL 290303, at \*3 (N.D. Ill. March 20, 2001); Ernest P. Kline & Eugene F. Knopf, v. First Western Government Securities, Inc., et al., No. 83-CV-1076, 1996 WL 153641, at \*12 (E.D.Pa. January 24, 1996). As such, the Court feels obliged to note some of the inconsistencies in Plaintiffs' class definitions.

E. Rule 23(b)(2) and Rule 23(b)(3).

Because of the Court's conclusion that Plaintiff's have not satisfied 23(a), the Court does not reach the propriety of certifying the proposed class definition under Rule 23(b)(2) or Rule 23(b)(3).

### III. CLASS CERTIFICATION UPON THE DEFINITION ADVANCED IN CONNECTION WITH THE SEPTEMBER 23 ORDER.

Plaintiffs suggest that, should the instant class definition not warrant certification, the Court should certify a class pursuant to the definition earlier provided in connection with the September 23 Order. The Court disagrees. As discussed supra, the Court does not find any substantive difference between Defendants two concessions. For this reason, the prior class

definition would fail for the identical reasons articulated in the September 23 Order. Accordingly, the Court declines to certify a class based upon that earlier submitted, and previously rejected, class definition.

IV. CONCLUSIONS.

For the reasons discussed supra, the Court GRANTS Defendants' motion to change their concession of liability and DENIES Plaintiffs' motion to certify a class.

**SO ORDERED**

Dated: Central Islip, New York  
August 20, 2004

*As/*  
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United States District Judge )