

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

JEFFREY BARHAM, *et al.*,)
)
)
 Plaintiffs,)
) Civ. Action No. 02-2283 (EGS)
 v.)
)
 CHARLES RAMSEY, *et al.*,)
)
)
 Defendants.)

MEMORANDUM OPINION

This case arises from arrests in Pershing Park on September 27, 2002 during demonstrations in connection with World Bank and International Monetary Fund meetings in Washington, D.C. Plaintiffs represent a class of individuals who were arrested during the morning of the demonstrations. Plaintiffs claim violations of their First, Fourth, and Fourteenth Amendment rights, as well as false arrest, imprisonment, and conversion. Pending before the Court is the defendants' motion to propound limited written discovery to the absent class members. Upon review of the motion, response and reply thereto, the applicable law, and the entire record, the Court **DENIES** defendants' motion.

I. BACKGROUND

The D.C. Circuit's January 13, 2006 opinion details the events at Pershing Park on the morning of September 27, 2002, the aftermath of such events, and the involvement of the District of

Columbia Metropolitan Police Department ("MPD"). See *Barham v. Ramsey*, 434 F.3d 565 (D.C. Cir. 2006). This Court's July 10, 2007 Memorandum Opinion details the involvement of the federal defendants¹ in those same events. The District of Columbia defendants ("District defendants") and the federal defendants now both move the Court to allow written interrogatories to be propounded to the absent class members in this litigation. While the District and federal defendants have filed separate motions, their arguments and proposed interrogatories are virtually identical. The plaintiffs have filed a joint opposition and defendants filed a joint reply. Thus, the motions will be addressed concurrently in this opinion.

Defendants seek information regarding the absent class members' activities and experiences before, during, and after their arrest at Pershing Park and their subsequent confinement. Specifically, defendants want to know the details regarding the absent class members' participation in any demonstration activities before they entered Pershing Park on September 27, 2002; any physical or physiological injuries sustained or

¹ The federal defendants include: the United States; Gale Norton, Director of the National Park Service, in her official capacity; Attorney General Alberto Gonzales, in his official capacity; Richard Murphy, acting Commander of the Special Forces Branch of the U.S. Park Police, in his official and individual capacity; and unidentified officers, supervisors, and law enforcement agencies, in their official and individual capacities.

property loss that occurred as a result of being arrested at Pershing Park; and any effects the experience may have had on the class members' plans to participate in any future demonstrations. See Dist. Def.'s Mot., Ex 1; Fed. Def.'s Mot. Ex. 2. Defendants contend this information is

critical to determine whether the police defendants intentionally conspired to arrest almost 400 people at Pershing Park in order to execute unlawful preemptive arrests for the purpose of taking off the streets persons who were at all times acting lawfully so the class members could not exercise their First Amendment Rights, or whether, as the defendants contend, the police were in good faith attempting to cope with roving groups of demonstrators who unilaterally took to the streets without permits or other lawful authorization....

District Def.'s Mot. at 11. Plaintiffs oppose the motion on the grounds that defendants have not met the standards which authorize discovery against absent class members in our circuit.

II. STANDARD OF REVIEW

Federal Rule of Civil Procedure 23 governs the administration of class action lawsuits and provides for the efficient and fair administration of controversies where the class suing or to be sued is sufficiently numerous, shares common claims, and is adequately represented by named plaintiffs whose claims are typical of the rest of the class. See Fed. R. Civ. P. 23(a). The rule envisions a "truly representative suit to avoid, rather than encourage, unnecessary filing of repetitious papers and motions." *American Pipe & Const. Co. v. Utah*, 414 U.S. 538,

550 (1974). "It is undisputed that the purpose of Rule 23 is to prevent piecemeal litigation to avoid both a multiplicity of suits on common claims resulting in inconsistent adjudications and the difficulties in determining the res judicata effects of a judgment." *Donovan v. University of Texas at El Paso*, 643 F.2d 1201, 1206 (5th Cir. 1981).

Federal Rules 33 and 34 regulate discovery. While discovery against absent class members under Rules 33 and 34 cannot be had as a matter of course, the "evolving view" is that the Court has the power under its authority to manage class actions under Rule 23(d)² to permit reasonable discovery when the circumstances of the case justify it. *United States v. FEOC Trucking Employers, Inc.*, 72 F.R.D. 101, 104 (D.D.C. 1976) (allowing limited discovery upon a showing of necessity). In *Dellums v. Powell*, 566 F.2d 167 (D.C. Cir. 1977), the defendant did not engage in any pre-trial discovery nor did it ask the Court to certify subclasses. The D.C. Circuit rejected defendant's request for post-trial discovery of the absent class members, though opined that discovery of absent class members would be permissible in certain cases. Specifically, the Court declared that discovery against absent class members could not be had as a matter of course, but

² Rule 23(d)(5) empowers the Court to make appropriate orders to deal with procedural matters in class actions. See F.R.C.P. 23(d)(5).

may be had "relevant to the decision of common questions, when the interrogatories or document requests are tendered in good faith and are not unduly burdensome, and when the information is not available from the representative parties." 566 F.2d at 187. In a related case, the Circuit warned that discovery against absent class members "can be a tactic to take undue advantage of the class members... and further that Rule 23... contemplates that absentee parties shall remain the passive beneficiaries of class suits, [therefore] courts have found it necessary to restrict availability of discovery against absentees to those instances in which a need can be shown." *Dellums v. Powell*, 566 F.2d 231, 236 (D.C. Cir. 1977) (internal citations omitted). Finally, the Manual for Complex Litigation explains that "[o]ne of the principal advantages of class actions over massive joinder or consolidation would be lost if all class members were routinely subjected to discovery." Federal Judicial Center, Manual for Complex Litigation (Fourth) (2004) § 21.41 at 302.

III. ANALYSIS

Defendants insist that discovery against the absent class members is critical to their right to a fair trial and seek leave to propound 27 interrogatories to the 281 class members who have been identified based upon MPD arrest records for Pershing Park for September 27, 2002. While defendants concede that both this

Court and the Court of Appeals have determined that the arrests at Pershing Park were unlawful, Dist. Def.'s Mot. at 11 (citing *Barham v. Ramsey*, 434 F.3d 565, 568 (D.C. Cir. 2006)), they contend that discovery is critical to the resolution of multiple issues, namely: whether defendants intentionally conspired to unlawfully arrest people, whether police motivation was malicious and conspiratorial, whether the actions of the protestors justified police action, whether the great majority of persons arrested were not directed or forced into the park by police but rather voluntarily entered the park after unlawfully marching through the streets; and whether the named representatives fairly represent the class, or, as defendants allege, that most people forced into the park were not political activists, but rather bystanders, observers, or non-demonstrators. See Dist. Def.'s Mot. at 11-14. In addition to the above claims, the federal defendants also allege that class discovery is necessary to establish that the federal defendants came to Pershing Park for a legitimate law enforcement purpose and thereafter rendered lawful assistance in response to such a request by the MPD. Fed. Def.'s Mot. at 12. Finally, all defendants argue that class members' activities before, during, and after their arrests are critical to a determination of damages in this case. Dist. Def.'s Mot. at 14; Fed. Def.'s Mot. at 17.

The Court agrees that in certain circumstances, discovery against absent class members may be permitted. See *Dellums v. Powell*, 566 F.2d 167 (D.C. Cir. 1977); *United States v. FEOC Trucking Employers, Inc.*, 72 F.R.D. 101 (D.D.C. 1976); *Disability Rights Council v. WMATA*, 2006 U.S. Dist. LEXIS 63424 (D.D.C. 2006). However, the Court finds that the circumstances of this case do not warrant this unusual measure.

In *United States v. FEOC Trucking Employers*, the United States sought relief under Title VII of the Civil Rights Act of 1964 for discrimination in the trucking industry. 72 F.R.D at 104. In evaluating plaintiff's request for discovery against absent defendant class members, the Court declared that discovery could be had only when the circumstances of the case justify such action.

The most important relevant circumstances are that the party seeking the discovery must demonstrate its need for the discovery for purposes of trial of the issues common to the class, that the discovery not be undertaken with the purpose or effect of harassment of absent class members or of altering the membership of the opposing class, and that the interrogatories be restricted to information directly relevant to the issues to be tried by the Court with respect to the class action aspects of the case.

Id. The Court allowed discovery against defendant absent class members because the Court determined the information sought was necessary to the trial of common class issues and neither plaintiffs nor the named defendants had the information. *Id.* at 104-05.

In the instant case, defendants have not made a showing of necessity. Defendants have proposed 27 interrogatories for the absent class members which concern the class members' activities on September 27, 2002 and beyond. Specifically, interrogatories 1-15 inquire into the class members' activities prior to their arrest, and include questions regarding whether class members walked on streets or sidewalks, whether they obeyed traffic laws, whether they believed it was legal to walk or ride in the street, the route class members walked or rode to reach the park, and the approximate number of people class members observed walking or riding in the street. Def.'s Interrogatories, p. 7-9.

Defendants contend this information is crucial to defend against plaintiffs' claims, and that it specifically speaks to the existence of a police conspiracy, unlawful police motivation, and justification for the mass arrest. Def.'s Reply at 16.

Plaintiffs respond that this information is not necessary because they have not averred civil conspiracy on behalf of the class and that defendants' other arguments in support of discovery are nothing more than post-hoc justification for arrests already declared unlawful. Pl.'s Opp'n at 3, 6.

The Court is not persuaded this information is necessary, or even relevant, to the officers' motivation on September 22, 2007. Absent class members cannot testify to the state of mind of the defendants, nor can they speak to whether defendants agreed to

deprive plaintiffs of their constitutional rights. Rather, only defendants can present this information to the jury.

Defendants further contend that this information is necessary to establish that "there was a real, significant and unlawful incident of roving demonstrations in the streets... which precipitated the arrests in Pershing Park...." Def.'s reply at 5. Again, defendants have failed to show necessity. No one disputes the presence of demonstrators in the District of Columbia on September 27, 2002. Defendants have access to hundreds of officers who can testify to their own observations of any lawlessness that may have taken place. This information is not unavailable from other sources such that only the absent class members can provide it. *C.f. FEOC Trucking Employees*, 72 F.R.D. at 105. Furthermore, whether or not absent class members participated in any such acts is irrelevant at this point, because this Court and the Court of Appeals have already determined that defendants lacked probable cause to arrest all the people in Pershing Park, whether or not specific individuals among them may have engaged in any earlier unlawful activity. 338 F.Supp.2d 48, 58 (D.D.C. 2004) *aff'd by Barham v. Ramsey*, 434 F.3d 565, 576 (D.C. Cir. 2006).

Interrogatories 16-27 inquire into the class members' experience of the arrest itself and any potential injuries they may have suffered. Defendants claim these questions are

necessary to determine damages, stating that, "given the decisions rendered by this Court and the Court of Appeals, damages may be the major issue in the trial of this case." Def.'s Reply at 8. However, inquiries into individual damages are not issues "common to the class" as *Dellums* requires. 566 F.2d at 187. As plaintiffs point out, there have been multiple groups of settlement pertaining to the September 27, 2002 arrests and in not one of those settlements or related offers of judgment has there been an individualization of damages on any basis. Pl.'s Opp'n at 14 (citing Settlement Agreement [doc. no. 99] in *Julie Abbate, et al. v. Chief Charles Ramsey, et al.*, Case No. 03-0767 (EGS); Joint Praecipe Regarding Accepted Offer of Judgment [doc. no. 306] in *Jeffrey Barham, et al., v. Charles Ramsey, et al.*, Case No. 02-2283 (EGS); Notice of Acceptance of Offer of Judgment by Enright [doc. no. 144], Notice of Acceptance of Offer of Judgment by Chastain and Young [doc. no. 190] in *Rayming Chang, et al. v. United States of America, et al.*, Case No. 02-2010 (EGS)). While the settlement of related cases is certainly not dispositive of a damage calculation in this case, it does undermine defendants' contention that an individualized assessment of damages is the only means of resolution to plaintiffs' claims.

Defendants also rely on *Disability Rights Council v. WMATA*, 2006 U.S. Dist. LEXIS 63424. There, the Court allowed limited

discovery against the absent class members who had submitted written complaints against WMATA's "MetroAccess" service for disabled riders. The Court found that "because these statements will be relied upon and because these customers may be witnesses, WMATA has the right to discovery beyond what the absent class members have said to establish the factual incorrectness of what was said or to see if their experiences were frequent or aberrational." *Id.* at 5. The circumstances in the instant case are distinguishable. First, the WMATA absent class members had affirmatively come forward and submitted declarations detailing their individual experiences of dissatisfaction, effectively choosing to be part of the litigation. Second, unlike in the instant case, liability rested upon those declarations. Here, liability has all but been decided and the Court has already determined that the class members' pre-arrest activities are irrelevant to whether defendants had probable cause to arrest them.

Finally, defendants allege that the conduct and testimony of the 17 named class representatives is not representative of the almost 400 members of the class. *Dist. Def.'s Mot.* at 16. Defendants argue that plaintiffs "should not be allowed to try their case to the jury on the...anecdotal testimony of the 17 class representative plaintiffs, who have been selected by plaintiffs' counsel." *Id.* The Court has already certified this

class, and in so doing found, as it was required to do under Rule 23(a), that "the claims or defenses of the representative parties are typical of the claims or defenses of the class, and the representative parties will fairly and adequately protect the interests of the class." Fed. R. Civ. P. 23(a). Defendants apparently believe this class was improperly certified and argue that discovery against absent class members is somehow a remedy for this error. The Court is confident in its prior certification ruling and rejects defendants' argument.

In addition to the above, the federal defendants contend that discovery against the absent class members is necessary to establish that the federal defendants came to Pershing Park for a legitimate law enforcement purpose and thereafter rendered lawful assistance in response to such a request by the MPD. Fed. Def.'s Mot. at 12. The Court rejects this argument for substantially the same reasons articulated above. The federal defendants have failed to show the necessity of this information and that this information is unavailable from other sources. Furthermore, it is doubtful the absent class members can provide this information at all. Defendants' own witnesses are the proper parties to speak to the federal defendants' "law enforcement purpose" or any requests made by the MPD.

IV. CONCLUSION

For the reasons stated above, the Court finds that the information sought in defendants' interrogatories is not necessary to defendants' case, nor is it unavailable from the representative parties. Because these are sufficient grounds upon which to deny defendants' motion, the Court will not reach plaintiffs' allegations of bad faith and intent to delay the litigation. Defendants' motion to propound written discovery to absent class members is therefore **DENIED**. An appropriate order accompanies this memorandum.

Signed: Emmet G. Sullivan
United States District Judge
November 8, 2007