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

Leoncio Elizarri, et al.,	)	
	)	
Plaintiffs,	)	
	)	No. 17-cv-8120
-vs-	)	
	)	*(Judge Seeger)*
Sheriff of Cook County and Cook County, Illinois,	)	
	)	
	)	
Defendants.	)	

MEMORANDUM IN SUPPORT OF AMENDED MOTION FOR CLASS CERTIFICATION

Plaintiffs submit this memorandum in accordance with the Court's order of July 9, 2021 (ECF No. 147) to show that the Court should order this case proceed as a class action for the following two subclasses of all persons who left the Cook County Jail to serve a sentence in the Illinois Department of Corrections (IDOC) on and after November 9, 2015:

a) Persons whose clothing was taken by the Sheriff to be used by detainees upon release from the Cook County Jail (Fifth Amendment Takings Subclass);

b) Persons whose government issued identification remained in the custody of the Sheriff of Cook County (Fifth and Fourteenth Amendment Damages Subclass).

Plaintiffs raise other claims about the property of detainees transferred from the Jail to the IDOC. The facts material to those claims are at

present unclear and plaintiffs cannot, consistent with Rule 11, seek class certification on these claims until ongoing discovery has been completed.[1]

I. Introduction

Defendant Sheriff of Cook County stores the clothing and personal property that accompany a detainee to the Jail. (ECF No. 145, Answer to Second Amended Complaint, ¶ 11.[2]) The Sheriff returns the clothing and personal property to detainees who are discharged from the Jail but follows a different procedure for those leaving the Jail to serve a sentence in the (IDOC).

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[1] Before September 28, 2020, the Sheriff's position was that it was storing the "unclaimed" property of detainees who had left the Jail at its warehouse. An inventory of the "unclaimed" property in 2011 counted 57,641 bags of stored property. The Sheriff reiterated on several occasions after 2011 that it was continuing to store this property. The Sheriff reaffirmed this position in interrogatory answers in this case served on July 12, 2019 but then revealed, in an interrogatory answer served on September 28, 2020, that it had started to destroy this property in 2018, decreasing the number of stored property bags to about 5,000 items.

Plaintiffs deposed Patricia Horne, the "Director of the offices' supply chain management," on July 21, 2021. Ms. Horne, who is responsible for the Sheriff's warehouse, stated that the Sheriff does not store detainee property at the warehouse for longer than ten days, when the Sheriff disposes of the property, selling it to a recycler or scavenger by the pound.

Plaintiffs will continue to conduct discovery to clarify the apparent contradictions between the Sheriff's official position in this litigation and Ms. Horne's testimony to determine whether plaintiffs may appropriately seek class certification issue about this property.

[2] Plaintiffs rely on the Sheriff's failure to deny this and the other cited paragraphs of the second amended complaint in its answer, ECF No. 145. *United States v. One Heckler-Koch Rifle*, 629 F.2d 1250, 1252 (7th Cir. 1980) ("failure to deny the allegations must be deemed an admission of its truth").

Illinois law requires the Sheriff to send to IDOC all prisoner property "allowed by the receiving facility." (Exhibit 1, 20 Ill. Admin. Code § 701.60(d)(4).[3]) The regulation provides that, "Personal property allowed by the receiving facility shall be transferred with the detainee." (*Id.*) The IDOC will not accept civilian clothing, which means that clothing is not "[p]ersonal property allowed by the receiving [IDOC] facility." (Exhibit 2, Letter from IDOC to Sheriff, Cook County, August 19, 2005.) The Illinois Department of Corrections will, however, accept government identification cards, including driver's licenses. (Exhibit 5, Deposition of IDOC Superintendent Engleson, *Elizarri v. Sheriff (I)*, No. 07-cv-2427, 12:10-19.) These items are "[p]ersonal property allowed by the receiving facility," and the Sheriff is therefore required by Illinois law to transfer them to IDOC.

The Sheriff requests prisoners leaving the Jail for IDOC to "donate" their civilian clothing and to acknowledge the donation on a written form. Plaintiff Jordan did not agree to donate his clothing; he did not check the box for "donate" on the form, but it was written in for him. (Exhibit 3, Jordan Dep. 65:16-20.) Jordan's involuntary donation exemplifies the Hobson's choice of the Sheriff's policy: prisoners leaving the Jail for the IDOC, who

[3] The Administrative Code has "the force and effect of law," *Union Elec. Co. v. Department of Revenue*, 136 Ill.2d 385, 391, 556 N.E2d 236, 239 (1990).

do not have a designee able to visit the Jail and retrieve personal property, are told that they can "donate" their clothing; if they refuse to authorize the donation, the Sheriff will, after 45 days, treat the property as having been donated so that it "can be given to indigent subjects upon discharge." (Exhibit 4 at 17, Procedure 109.8.) A detainee's refusal to "donate" clothing is therefore meaningless.

The Sheriff does not provide compensation to a detainee whose property was taken to be given to indigent prisoners. (ECF No. 145, Answer to Second Amended Complaint, ¶ 21.) Plaintiffs contend that this is a taking of private property for public use, without just compensation, in violation of the Fifth Amendment.

The Sheriff does not send government issued identification cards to IDOC, even though, as explained above, Illinois law requires transferring these items because IDOC will accept them. The Sheriff's policy requires persons released from IDOC to incur the time and expense of acquiring replacement identification cards.

Each of the named plaintiffs had a state identification card or a driver's license when he was arrested, and the Jail did not send the card or driver's license to IDOC when the plaintiff was transferred. Elizarri had an Illinois driver's license (Exhibit 6 at 1, Letter from Defense Counsel);

Jordan and Velleff each had a State of Illinois identification card (Exhibit 7, ECF No. 121 at 2; Exhibit 8, ECF No. 148 at 4.) These ID cards remained with the Sheriff until, years after release from the IDOC when the expired identification had been replaced, the Court ordered the return of the property. Plaintiffs contend that the Sheriff's policy of refusing to send government issued identification to the IDOC is a violation of the Takings Clause or, alternatively, the Due Process Clause of the Fourteenth Amendment.[4]

II. The Case Should Be Maintained as a Class Action

Federal Rule of Civil Procedure 23 permits a litigant to "bring his claim in a class action if he wishes," *Shady Grove Orthopedic Associates, P.A. v. Allstate Ins. Co.*, 559 U.S. 393, 400 (2010), by creating "a categorical rule entitling a plaintiff whose suit meets the specified criteria to pursue his claim as a class action." *Id.* at 398.

Whether a case satisfies Rule 23 "is largely independent of the merits." *Beaton v. SpeedyPC Software*, 907 F.3d 1018, 1031 (7th Cir. 2018). The Seventh Circuit has repeatedly rejected the argument that "class certification is proper only when the class is sure to prevail on the merits." *Schleicher v. Wendt*, 618 F.3d 679, 685 (7th Cir. 2010).

[4] To the extent the Sheriff seeks to defeat the Due Process claim under *Parratt v. Taylor*, 451 U.S. 527 (1984), this argument was rejected in *Elizarri (I) v. Sheriff of Cook County*, No. 07 CV 2427, 2015 WL 1538150, at *5 (N.D. Ill. March 31, 2015) as required by *Wilson v. Civil Town of Clayton*, 839 F.2d 375, 380 (7th Cir. 1988).

Plaintiffs show below that each proposed subclass satisfies the four subsections of Rule 23 and that certification is appropriate under Rule 23(b)(3). Plaintiffs therefore have "the right to have a class certified." *U.S. Parole Commission v. Geraghty*, 445 U.S. 388, 403 (1980).

A. The Class Is Ascertainable

Each proposed subclass consists of persons transferred from the Cook County Jail to the Illinois Department of Corrections. The Sheriff's computerized records show the identity of persons transferred from the Jail to the Illinois Department of Corrections. This information is contained in a field named "ReleaseReason" in the Sheriff's Booking Table, obtained by counsel through a Freedom of Information Act Request, and attached as Exhibit 9.

The Sheriff keeps track of detainees whose property was taken to be used by other detainees upon release from the Cook County Jail. Section 8 of CCDOC Policy 109 requires the officer selecting property "that can be given to indigent subjects upon discharges" to "document what was removed and record the date in the appropriate section of the jail management system." (Exhibit 4, Policy 109, Section 8 at 17.) This rule appears to be followed: in response to an interrogatory, the Sheriff identified more than 80 detainees whose clothing is shown in the Sheriff's records as "donated." (Exhibit 10, Response to Interrogatory 2(b) at 6-7.) In another case where the

Sheriff's computerized records could be used to identify class members, the Seventh Circuit ruled that the "records provide an extremely clear and objective criterion for ascertaining the class." *Lacy v. Cook County*, 897 F.3d 847, 864 n.36 (7th Cir. 2018)

B. Numerosity Under Rule 23(a)(1)

Records produced by the Sheriff through FOIA requests show that more than 35,000 persons were sent from the Cook County Jail to IDOC since November 8, 2015. Although plaintiffs do not have data showing the number who entered the Jail with government issued identification, a sampling of 42 persons who left the Jail for IDOC between 2013 and 2016 (when more than 57,000 persons left the Jail for IDOC) shows that 39 had government issued identification. (Exhibit 11 Section 1746 Declarations, served as part of plaintiffs' MIDP disclosures.) A different sample of 317 detainees who left the Jail in 2013 and 2014 (when more than 23,000 persons left the Jail for IDOC), shows more than 80 whose clothing was "donated." (Exhibit 9, Response to Interrogatory 2(b) at 6-7.)

Plaintiffs are not required to specify the exact number of persons in the class, *Vergara v. Hampton*, 581 F.2d 1281, 1284 (7th Cir.1978), but need only present enough evidence to show that it is "reasonable to believe [the class is] large enough to make joinder impracticable and thus justify a class

action suit." *Chapman v. Wagener Equities Inc.*, 747 F.3d 489, 492 (7th Cir. 2014). This is especially true when "a forty-member class is often regarded as sufficient to meet the numerosity requirement." *Mulvania v. Sheriff of Rock Island County*, 850 F.3d 849, 858 (7th Cir. 2017). Each proposed class therefore satisfies the numerosity requirement of Rule 23(a)(1).

C. Commonality Under Rule 23(a)(2)

To satisfy the commonality requirement of Rule 23(a)(2), the "prospective class must articulate at least one common question that will actually advance all of the class members' claims." *Phillips v. Sheriff of Cook Cty.*, 828 F.3d 541, 550 (7th Cir. 2016). For example, in *Orr v. Shicker*, 953 F.3d 490 (7th Cir. 2020), the district court identified the common question, "whether every inmate with Hepatitis C in the IDOC should be treated." *Id.* at 499. Defendants in *Orr* asked the Court of Appeals to reject this common question, arguing that "medical care, by its nature, is individualized." *Id.* The Seventh Circuit rejected this argument because, as in this case, the plaintiffs challenged "system-wide policies and practices." *Id.*

A common question for subclass (a) is whether the Sheriff's policy of giving detainee property to indigent detainees is a taking of private property for public use, without just compensation, in violation of the Fifth Amendment. The Fifth Amendment imposes two conditions on the government's power to seize private property: "the taking must be for a 'public use'

and 'just compensation' must be paid to the owner." *Brown v. Legal Found. of Washington*, 538 U.S. 216, 231–32 (2003). Whether the Sheriff's policy's satisfies these conditions is a common question that will advance the claims of all members of this subclass.

A common question for subclass (b) is whether the Sheriff's policy of not sending government issued identification to the Illinois Department of Corrections results in a taking of property without compensation in violation of the Fifth Amendment or, alternatively, a denial of property without due process, in violation of the Fourteenth Amendment. See *Gates v. City of Chicago*, 623 F.3d 389, 401-04 (7th Cir. 2010).

There is no factual variation in either claim, *Arreola v. Godinez*, 546 F.3d 788, 798 (7th Cir. 2008), and resolution of these common question "will actually advance all of the class members' claims." *Phillips*, *supra.*

There is no merit in any argument that commonality turns on whether the Sheriff may lawfully take clothing from detainees who are transferred to the IDOC and distribute it to those in need. As the Seventh Circuit made plain in *Driver v. Marion County Sheriff*, 859 F.3d 489 (7th Cir. 2017), the Court's "its role in assessing class certification did not include a determination of the case on the merits." *Id.* at 493. This is because "certification is largely independent of the merits." *Beaton v. SpeedyPC Software*, 907 F.3d

1018, 1031 (7th Cir. 2018) (cleaned up). Class certification does not require "surety of prevailing on the merits." *Bennett*, 953 F.3d at 469. "Classes can lose as well as win." *Id.* Because plaintiffs are challenging a general policy, commonality is satisfied. *Chicago Teachers Union, Local No. 1 v. Bd. of Educ. of City of Chicago*, 797 F.3d 426, 437 (7th Cir. 2015).

D. Typicality Under Rule 23(a)(3)

Typicality in Rule 23(a)(3) "is closely related to the preceding question of commonality." *Rosario v. Livaditis*, 963 F.2d 1013, 1018 (7th Cir. 1992). A "plaintiff's claim is typical if it arises from the same event or practice or course of conduct that gives rise to the claims of other class members and his or her claims are based on the same legal theory." *De La Fuente v. Stokeley–Van Camp, Inc.*, 713 F.2d 225, 232 (7th Cir. 1983).

Plaintiffs' challenges to the Sheriff's policies arise "from the same event or practice or course of conduct that gives rise to the claims of other class members and [their] claims are based on the same legal theory." *Oshana v. Coca-Cola Co.*, 472 F.3d506, 514 (7th Cir. 2006). The case therefore satisfies the typicality requirement of Rule 23(a)(3).

E. Adequacy Under Rule 23(a)(4)

Plaintiffs will adequately represent the proposed class, as required by Rule 23(a)(4).

First, defendants have not asserted any unique defense against the named plaintiffs. *Randall v. Rolls–Royce Corp.*, 637 F.3d 818, 824 (7th Cir. 2011); *Lipton v. Chattem, Inc.*, 289 F.R.D. 456, 459 (N.D. Ill. 2013). Defendants may argue that the named plaintiffs lack standing to represent any class because the Sheriff has returned some of the property it was holding that belongs to Elizarri, Jordan, and Velleff, but by the time the Sheriff finally returned the identification cards, the plaintiffs had already been required to replace them. And the Sheriff has not returned any clothing belonging to the plaintiffs. Moreover, the Supreme Court rejected similar arguments in *Deposit Guaranty National Bank v. Roper*, 445 U.S. 326, 327 (1980) and *Campbell-Ewald Co. v. Gomez*, 136 S. Ct. 663, 672 (2016), *as revised* (Feb. 9, 2016).

Second, plaintiffs are represented by counsel skilled and experienced in these matters.

Plaintiffs' principal attorney (Kenneth N. Flaxman), was admitted to practice in 1972; his work in class action litigation includes *United States Parole Commission v. Geraghty*, 445 U.S. 388 (1980) (class action challenging federal parole guidelines); *Doe v. Calumet City*, 128 F.R.D. 93 (N.D. Ill. 1989) (class action challenging strip search practice of Calumet City police department); *Calvin v. Sheriff of Will County*, 405 F.Supp.2d 933 (N.D. Ill.

2005) (class action challenging strip search practice at Will County Jail). Plaintiffs' principal attorney has also argued more than 150 federal appeals, including five cases in the United States Supreme Court.[5]

Plaintiffs second attorney (Joel A. Flaxman), is also competent to represent the class; he was admitted to practice in 2007, served three years in judicial clerkships,[6] followed by four years as a trial attorney in the United States Department of Justice, Civil Rights Division, before entering private practice.[7]

F. Rule 23(b)(3)

The final requirement for certification is Rule 23(b)(3), which requires that "questions of law or fact common to class members predominate over any questions affecting only individual members, and that a class action is superior to other available methods for fairly and efficiently adjudicating

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[5] In addition to *Geraghty*, Flaxman argued *Browder v. Director, Department of Corrections*, 434 U.S. 257 (1978); *Jaffee v. Redmond*, 518 U.S. 1 (1996); *Ricci v. Arlington Heights, cert dismissed as improvidently granted*, 523 U.S. 613 (1998), and *Wallace v. Kato*, 549 U.S. 384 (2007).

[6] Counsel was a staff law clerk for the Seventh Circuit from 2007 to 2009 and then a law clerk for the Honorable Rebecca Pallmeyer from 2009 to 2010.

[7] With co-counsel, plaintiffs' second attorney has served as class counsel in several recent cases, including *Rogers v. Sheriff of Cook County*, No. 1:15-CV-11632, 2020 WL 7027556 (N.D. Ill. Nov. 29, 2020); *Conyers v. City of Chicago*, No. 12 CV 06144, 2017 WL 4310511 (N.D. Ill. Sept. 28, 2017), *appeal pending*, 7th Cir., No. 20-1934; *Wilson v. City of Evanston*, No. 14 C 8347, 2017 WL 3730817 (N.D. Ill. Aug. 30, 2017); *Bell v. Dart*, No. 14 C 8059, 2016 WL 337144 (N.D. Ill. Jan. 26, 2016); *Beley v. City of Chicago*, No. 12 C 9714, 2015 WL 8153377, at *1 (N.D. Ill. Dec. 7, 2015); and *Lacy v. Dart*, No. 14 C 6259, 2015 WL 1995576 (N.D. Ill. Apr. 30, 2015).

the controversy." Court in this district routinely hold that "when a class challenges a uniform policy or practice, the validity of the policy or practice tends to be the predominant issue in the ensuing litigation." *CE Design Ltd. v. Cy's Crabhouse N., Inc.*, 259 F.R.D. 135, 142 (N.D. Ill. 2009); *see also Streeter v. Sheriff of Cook County*, 256 F.R.D. 609, 614 (N.D. Ill. 2009); *Herkert v. MRC Receivables Corp.*, 254 F.R.D. 344, 352 (N.D. Ill. 2008); *Young v. County of Cook*, 2007 WL 1238920, at *7 (N.D. Ill. April 25, 2007).

This reasoning applies here because plaintiffs challenge the Sheriff's uniform policies. The common issues about the Sheriff's policies "can be resolved for all members of a class in a single adjudication." *Messner v. Northshore Univ. HealthSystem*, 669 F.3d 802, 811 (7th Cir. 2012) (cleaned up). These "common, aggregation-enabling, issues in the case are more prevalent or important than the non-common, aggregation-defeating, individual issues." *Tyson Foods, Inc. v. Bouaphakeo*, 136 S. Ct. 1036, 1045 (2016)

In addition to satisfying the predominance prong of Rule 23(b)(3), a class action is superior to other methods for adjudicating the claims of the members of the proposed class. The amount of damages to which each plaintiff would be entitled is small: the clothing is likely to have an average value of less than one hundred dollars; the cost of replacement of an Illinois Driver's license is five dollars; replacing a state identification card costs

twenty dollars. OFFICE OF THE ILLINOIS SECRETARY OF STATE, FEES DRIVERS SERVICES, https://www.cyberdriveillinois.com/departments/drivers/basicfees.html (visited July 22, 2021). Thus, "the amount of damages to which each plaintiff would be entitled is so small that no one would bring this suit without the option of a class." *Beaton v. SpeedyPC Software*, 907 F.3d 1018, 1030 (7th Cir. 2018). As the Seventh Circuit holds, "The policy at the very core of the class action mechanism is to overcome the problem that small recoveries do not provide the incentive for any individual to bring a solo action prosecuting his or her rights." *Mace v. Van Ru Credit Corp.*, 109 F.3d 338, 344 (7th Cir. 1997).

III. Conclusion

For the reasons above stated, the Court should order that this case proceed as a class action for the following two subclasses of all persons who left the Cook County Jail to serve a sentence in the Illinois Department of Corrections on and after November 9, 2015:

a) Persons whose clothing was taken by the Sheriff to be used by detainees upon release from the Cook County Jail (Fifth Amendment Takings Subclass);

b) Persons whose government issued identification remained in the custody of the Sheriff of Cook County (Fifth and Fourteenth Amendment Damages Subclass).

Respectfully submitted,
[signatures on next page]

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