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.	)	

REPLY MEMORANDUM IN SUPPORT OF AMENDED MOTION FOR CLASS CERTIFICATION

Plaintiffs sought certification of two subclasses: a "clothing" subclass and a "government identification" subclass. (ECF 150 at 1.)

The recent decision of the Seventh Circuit in *Conyers v. City of Chicago*, ___ F.4th ____ (No. 20-1934, August 18, 2021), *petition for rehearing filed* September 2, 2021, undercuts the arguments plaintiffs advanced in seeking certification of the "clothing" subclass. Rather than seek leave to amend the motion, plaintiffs hereby withdraw their request for certification of the "clothing" subclass. Plaintiffs will seek leave to renew this request if the Seventh Circuit modifies *Conyers* on rehearing. Accordingly, this memorandum is limited to the "government identification" subclass, which is not affected by *Conyers*.

The "government identification" claim was not at issue in *Elizarri (I) v. Sheriff*, 901 F.3d 787 (7th Cir. 2018); defendants' groundless assertion that this case is "an attempt to relitigate *Elizarri I*" (ECF No. 153 at 2), is incorrect. The reach of *Elizarri* is set out in the class certified in that case:

> All persons who, on or after June 6, 2005 made a timely request for the return of property taken from them upon admission to the Jail and were informed that the property had been lost or stolen. A request by a person who was released before July 27, 2007 was timely if it was made within 120 days of his/her release. A request by a person who was released on or after July 27, 2007 was timely if it was made within 90 days of his/her release.

(*Elizarri v. Sheriff*, 07-cv-2427, ECF No. 101 at 2.) The issue in *Elizarri I* was whether the Sheriff "did not do enough to prevent guards and other public employees from stealing or losing the belongings of inmates at the Cook County Jail." *Id.* at 789. The "government identification" claim does not involve the theft or loss of detainee property. Instead, the "government identification" claim challenges the Sheriff's policy of refusing to send government issued identification to the Illinois Department of Corrections when transferring a prisoner from the Cook County Jail to the IDOC.

Defendants are unable to deny the existence of this policy. As made plain in the deposition testimony of Deputy Roberto Ornelas, the policy of not sending government issued identification to the IDOC is uniformly applied to each prisoner who leaves the Jail for the IDOC:

Plaintiff's Counsel:	If there is a government issued identification in this property that the prisoner arrived with—at the jail with, is any effort made to remove that government issued ID and send it to IDOC with the prisoner?
Deputy Ornelas:	No, we do not give identifications to the detainees upon their shipment.

(Ornelas Dep. 21:20-22:2, ECF No. 153-2 at 6.)

Defendants argue, however, that plaintiffs have failed to show that the IDOC will accept government issued identification cards. (ECF No. 153 at 4-6.) Illinois law requires the IDOC to supply all county Sheriffs "with a list of approved personal property items." 20 Illinois Administrative Code 535.80(a) provides as follows:

> **Section 535.80 Procedure for New Admissions**
>
> a) All sheriffs shall be supplied with a list of approved personal property items. Only the approved items will be accepted by the Department upon admission of the committed person.
>
> 1) Non-approved items shall be receipted and returned to the sheriff prior to his departure from the facility, when possible; or
>
> 2) The committed person shall be requested to authorize the disposition of any unapproved property, in writing, in accordance with 20 Ill. Adm. Code 501.230.

Plaintiffs submitted with their memorandum the "list of approved personal property items" issued by the IDOC in 2005. (ECF No. 150-3 at 2.) Plaintiffs also submitted the deposition of IDOC Superintendent Tracy Engleson, taken in 2013 in *Elizarri (I)*, which establishes that the 2005 list was still in effect in 2013. (ECF No. 150-6 at 11, Engleson Dep. 11:11-15.) If

IDOC changed this list, it would have provided defendant Sheriff of Cook County with the updated list, as required by 20 Illinois Administrative Code 535.80(a). But the Sheriff fails to present any evidence of a change in IDOC policy. The Court should therefore reject defendants' argument that plaintiffs have failed to show the IDOC's current policy about accepting government issued identification. (ECF 153 at 5.)

Plaintiffs respond to defendants' specific challenges to class certification of the "government identification" subclass below.

I. The Class Is Ascertainable

There is no merit in defendants' argument that the proposed government identification subclass is not ascertainable because the class definition differs "from their Second Amended Complaint." (ECF No. 153 at 8.) A complaint need not include a class definition. *Chapman v. First Index, Inc.*, 796 F.3d 783, 785 (7th Cir. 2015). Even when the complaint includes a proposed definition, that definition is not controlling: "The class definition must yield to the facts, rather than the other way 'round." *Fonder v. Sheriff of Kankakee County*, 823 F.3d 1144, 1147 (7th Cir. 2016). *Chapman* squarely holds that the proposed class definition in the complaint does not control because "the obligation to define the class falls on the judge's shoulders under FED. R. CIV. P. 23(c)(1)(B)." *Chapman*, 796 F.3d at 785.

Defendants do not otherwise challenge the ascertainability of the "government identification" proposed subclass: the "Received Clothing Receipt" the Sheriff provides to detainees when they enter the Jail (Exhibit 12, attached) states whether the detainee entered with identification and the Sheriff's policy does not allow any government issued identification to accompany the prisoner to the IDOC. The Court should therefore reject defendants' ascertainability challenge.

II. Numerosity

Defendants do not challenge numerosity of the "identification subclass" and do not otherwise dispute that the class consists of far more than the forty-member benchmark approved in *Mulvania v. Sheriff of Rock Island County*, 850 F.3d 849, 858 (7th Cir. 2017).

III. Commonality

Defendants argue that the proposed class lacks commonality because "each detainee being transferred to IDOC is presented with several choices regarding their property." (ECF No. 153 at 11.) This is incorrect.

Prisoners being transferred to IDOC from the Jail do not have any choice about whether their government issued identification will accompany them to IDOC. The Sheriff's policy is that every prisoner's government issued identification will remain at the Jail. As Deputy Ornelas stated: "we do not give identifications to the detainees upon their shipment." (Ornelas Dep.

22:1-2, ECF No. 153-2 at 6.) Plaintiffs' challenge to this uniform policy presents the common question of law required by Rule 23. *Orr v. Shicker*, 953 F.3d 490, 499 (7th Cir. 2020).

IV. Typicality

Defendants do not challenge plaintiffs' showing (ECF 150 at 10) that the proposed class satisfies the typicality requirement of Rule 23(a)(3). The Court should therefore deem waived any challenge to typicality.

V. Adequacy

Defendants challenge whether each of the three named plaintiffs can be an adequate class representation. (ECF No. 153 at 12-13.) Defendants do not, however, dispute plaintiffs' showing that each named plaintiff has standing: each entered the Jail with government issued identification, and the identification did not accompany the plaintiff to IDOC. (ECF No. 150 at 4-5.)

There is no merit in defendants' undeveloped argument that neither the Elizarri estate nor plaintiff Jordan can adequately represent the class because the Sheriff returned their property during this litigation. (ECF No. 153 at 13.) Defendants do not respond to plaintiffs' showing that "by the time the Sheriff finally returned the identification cards, the plaintiffs had already been required to replace them." (ECF No. 150 at 11.) Instead, defendants simply quote this Court's observation that there may be a "question of

whether the named Plaintiffs could be adequate class representatives." (ECF 129.) The Court should decline to consider this undeveloped argument.

The Court should likewise reject defendants' challenge to plaintiff Velleff because he has an extensive felony background. (ECF No. 153 at 3-4.) This cannot be disqualifying when the proposed class "is made up entirely of prisoners." *Jackson v. Sheriff of Cook County*, 2006 WL 3718041, at *5 (N.D.Ill. Dec. 14, 2006). Class certification does not turn on Velleff's credibility when, as plaintiffs show below, the Sheriff is unable to dispute the existence of the challenged policy.

VI. Predominance under Rule 23(b)(3)

Defendants assert without elaboration that "[t]here are numerous questions of law and fact that are not common to the class." (ECF No. 153 at 14.) This is incorrect: each member of the class arrived at the Jail with government issued identification; because of the Sheriff's policy, each member of the class left the Jail for IDOC without their government issued identification. Members of the putative class were not "given a choice" about whether their government issued identification would be sent to IDOC; the Sheriff's uniform policy was to retain all government issued identification. The legality of this policy, which plaintiffs challenge under the Fifth and

Fourteenth Amendments, is the overriding issue in this case and satisfies the predominance requirement of Rule 23(b)(3).

VII. Superiority under Rule 23(b)(3)

Defendants do not challenge plaintiffs' showing (ECF 150 at 13-14) that a class action is superior to other methods for adjudicating the claims of the members of the proposed class. The Court should therefore deem waived any challenge to Rule 23(b)(3) superiority.

VIII. Conclusion

For the reasons above stated and those previously advanced, the Court should order that this case proceed as a class action for

> All persons who left the Cook County Jail to serve a sentence in the Illinois Department of Corrections on and after November 9, 2015 and whose government issued identification remained in the custody of the Sheriff of Cook County.

Respectfully submitted,

/s/ Kenneth N. Flaxman
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COOK COUNTY SHERIFF'S OFFICE
Received Clothing Receipt

Date: 4/20/2021
Time: 10:52 AM
Page: 2 of 2

Name: Velleff, TED K
Assigned Cell:
Inmate #: 0365223
Receipt Number:
Booking #: 20130925133

Quantity:	Description:	Color:	Property Bag Token:
1	ID/LACES/BELT	Multi	
Notes			
1	SHOES	Multi	
Notes			
1	PANTS	Beige	
Notes			
1	SHIRT	Blue	
Notes			

Clothing Received Date: 9/25/2013
Clothing Received Time: 7:00 PM
Clothing Officer:

Officer: ..... Officer: .....

Inmate (Booking): ..... Date: .....

Clothing left at the Cook County Jail for longer than 45 days after your release/transfer will be destroyed.

Inmate (Discharge): ..... Date: .....

I have received my clothing items upon discharge from the Cook County Department of Corrections.

Clothing Designee: ..... Date: .....

I have received the above named inmate clothing from the Cook County Department of Corrections.

Sheriff 0924