

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

ROSALETY BARNETT, et al.,
Plaintiffs,
v.
COUNTY OF CONTRA COSTA,
et al.,
Defendants.

NO. C04-4437 TEH

ORDER GRANTING
PLAINTIFFS' MOTION FOR
CLASS CERTIFICATION

This matter comes before the Court on Plaintiffs' second motion for class certification. After carefully considering the parties' written arguments, the Court finds oral argument to be unnecessary. With good cause appearing for the reasons discussed below, the Court now GRANTS Plaintiffs' motion.

BACKGROUND

Plaintiffs, who filed this case in 2004, contend that their constitutional rights were violated by Defendant Contra Costa County's now-discontinued policy of performing visual body cavity searches and strip searches on all persons arrested and housed prior to arraignment.¹ Initial discovery revealed that Rosalety Barnett, the original named plaintiff, was not searched pursuant to Defendants' blanket policy concerning pre-arraignment searches, and Plaintiffs subsequently sought and obtained leave from this Court to file an amended complaint naming a new proposed class representative. In 2007, the Court granted summary judgment as to claims by this second proposed named plaintiff, Peter Morganelli, concluding that the original complaint included only individuals arrested for misdemeanors

¹This Court has previously discussed the factual and procedural history of this case and will not repeat that background in detail here. *See, e.g.*, Jan. 24, 2007 Order at 2-4; Sept. 11, 2009 Order at 1-3,

1 while Morganelli was arrested for a felony, and that Morganelli's individual claims were
2 time-barred. Jan. 24, 2007 Order at 4-9. At the same time, the Court denied without
3 prejudice Plaintiffs' first motion for class certification because no proposed class
4 representative remained in the case. *Id.* at 10.

5 On November 27, 2007, Plaintiffs filed a second amended complaint naming Adeline
6 Chan as a proposed class representative. They filed their second motion for class
7 certification on July 6, 2009, with Chan as the sole proposed named plaintiff. Defendants
8 thereafter moved for summary judgment on Chan's claims. The Court granted as unopposed
9 the motion for summary judgment on Chan's state law claims but denied the motion as to
10 Chan's claim under 42 U.S.C. § 1983. Sept. 11, 2009 Order at 5-7. The parties subsequently
11 agreed to a revised briefing schedule on Plaintiffs' second motion for class certification.

12 In response to Defendants' opposition to Plaintiffs' originally proposed class
13 definition, Plaintiffs revised their proposed class definition on reply. Plaintiffs now seek to
14 certify the following class:

15 All persons, since October 20, 2002, and continuing until
16 Defendants' prior custom and policy was brought into
17 compliance with the law on June 1, 2003, or such other more
18 recent date when the policy was implemented, who were arrested
19 on any misdemeanor or lesser charge not involving weapons,
20 controlled substances, or felony violence, and who were
21 subjected to a uniform and indiscriminate (blanket) strip/visual
22 body cavity search(es) by defendants before arraignment at the
23 Contra Costa County Jails without any individualized reasonable
24 suspicion that they were concealing contraband. This class may
25 also include arrestees who were subjected to subsequent blanket
26 strip searches before arraignment after the initial strip search,
27 without any reasonable individualized suspicion that they had
28 subsequently acquired and hidden contraband on their persons.

Also excluded from the class are those otherwise eligible
arrestees who (1) have a history of at least one prior conviction or
two prior arrests for excludable offenses within the last five
years; (2) have a current probation condition which includes
consent to search; (3) upon arrest or detention, exhibit behavior
or circumstances indicating they may be a danger to
himself/herself or others; [or] (4) are strip searched after
arraignment.

Ex. K to Merin Reply Decl.

1 **DISCUSSION**

2 **I. Defendants' Request for Stay**

3 The Court first addresses Defendants' request for a stay pending resolution of the en
4 banc proceedings in *Bull v. City and County of San Francisco* in the United States Court of
5 Appeals for the Ninth Circuit. Although the Court previously indicated that it was inclined
6 to grant such a stay, it now agrees with Plaintiffs that a stay is not warranted at this time.
7 Plaintiffs correctly observe that the issue before the en banc court in *Bull* – the
8 constitutionality of a blanket strip search policy in San Francisco – does not impact whether
9 certification of the proposed class in this case would be proper. The Court therefore chooses
10 not to exercise its discretion to stay the class certification decision pending the outcome in
11 *Bull*. However, the Court notes that Plaintiffs' contentions concerning delay are not
12 persuasive; the delay in moving this case forward has been due primarily to Plaintiffs'
13 difficulties in locating a suitable class representative.

14
15 **II. Plaintiffs' Motion for Class Certification**

16 Having denied Defendants' request for a stay, the Court now turns to the merits of
17 Plaintiffs' motion for class certification.

18 **A. Legal Standard**

19 A party seeking to certify a class must demonstrate that it has met all four
20 requirements of Rule 23(a) of the Federal Rules of Civil Procedure and at least one of the
21 requirements of Rule 23(b). *Zinser v. Accufix Research Inst., Inc.*, 253 F.3d 1180, 1186 (9th
22 Cir. 2001). Rule 23(a) allows a class to be certified only if:

- 23 (1) the class is so numerous that joinder of all members is
24 impracticable;
- 25 (2) there are questions of law or fact common to the class;
- 26 (3) the claims or defenses of the representative parties are
27 typical of the claims or defenses of the class; and
- 28 (4) the representative parties will fairly and adequately protect
the interests of the class.

1 Fed. R. Civ. P. 23(a); *see also Zinser*, 253 F.3d at 1186. That is, the class must satisfy the
2 requirements of numerosity, commonality, typicality, and adequacy.

3 Rule 23(b) provides for the maintenance of three types of class actions. Plaintiffs seek
4 to certify the class under Rule 23(b)(3), which allows a class to be certified if “the court finds
5 that the questions of law or fact common to class members predominate over any questions
6 affecting only individual members, and that a class action is superior to other available
7 methods for fairly and efficiently adjudicating the controversy.” Fed. R. Civ. P. 23(b)(3).

8 The factors a court should consider when evaluating these issues include the following:

- 9 (A) the class members’ interests in individually controlling the
10 prosecution or defense of separate actions;
- 11 (B) the extent and nature of any litigation concerning the
12 controversy already begun by or against class members;
- 13 (C) the desirability or undesirability of concentrating the
14 litigation of the claims in the particular forum; and
- 15 (D) the likely difficulties in managing a class action.

15 *Id.*

16 The party seeking certification must provide facts to satisfy the above requirements,
17 *Doninger v. Pac. Nw. Bell, Inc.*, 564 F.2d 1304, 1309 (9th Cir. 1977), and the district court
18 must conduct a “rigorous analysis” of the moving party’s claims to examine whether the
19 requirements are satisfied, *Gen. Tel. Co. of the Sw. v. Falcon*, 457 U.S. 147, 161 (1982).
20 Although the court is “at liberty” to consider evidence that relates to the merits if such
21 evidence also goes to the requirements of Rule 23, *Hanon v. Dataproducts Corp.*, 976 F.2d
22 497, 508 (9th Cir. 1992), the court may not consider whether the party seeking class
23 certification has stated a cause of action or is likely to prevail on the merits, *Eisen v. Carlisle*
24 *& Jacquelin*, 417 U.S. 156, 178 (1974). If a district court concludes that the moving party
25 has met its burden of proof, then the court has broad discretion to certify the class. *Zinser*,
26 253 F.3d at 1186.

B. Analysis

1 **B. Analysis**
2 In this case, Defendants do not dispute that the proposed class, class representative,
3 and class counsel satisfy the requirements of Rule 23(a). Their primary argument is that
4 certification under Rule 23(b)(3) would be improper because individual issues predominate
5 over common issues and a class action would therefore not be a superior mechanism for
6 adjudicating the controversies at issue.²

7 Some courts have denied class certification in similar cases for these reasons. For
8 example, plaintiffs in an Iowa case sought “certification of a class defined as all persons
9 arrested on a serious misdemeanor charge and strip searched pursuant to the defendant
10 county jail’s across-the-board strip search policy during a twenty-one month period prior to a
11 change in the policy.” *Rattray v. Woodbury County*, 253 F.R.D. 444, 447 (N.D. Iowa 2008).
12 The district judge concluded that certification of a Rule 23(b)(3) class was “not appropriate
13 because, in this court’s view, class questions do not predominate over individual questions,
14 and, for essentially that same reason, a class action is not superior to other methods of
15 adjudicating the controversy.” *Id.* at 465. Other district courts have reached similar
16 conclusions. *E.g.*, *Bledsoe v. Combs*, Case No. NA 99-153-C H/G, 2000 WL 681094, at *5
17 (S.D. Ind. Mar. 14, 2000); *Doe v. Connecticut*, Case No. 3:00cv2036 (PCD) (D. Conn.),
18 Sept. 26, 2002 Order at 8-9 (Ex. 1 to Defs.’ App. of Unpublished Cases) (also noting that it
19 “is conceded that the [strip search] policy is not uniformly applied”); *Doe v. City & County*
20 *of San Francisco*, Case No. C04-4914 MJJ (N.D. Cal.), Nov. 29, 2006 Order at 5-7 (finding
21 that the proposed class was not ascertainable, and that the requirements Rule 23(a) were not
22 satisfied, in part because “membership [in the class] is contingent on the searches being
23 conducted without probable cause or reasonable suspicion” and “[t]o determine whether a
24 minor arrested during the proposed period qualifies for membership in [the] class, the Court
25 would have to engage in a case-by-case examination of the specific circumstances of the
26 minor’s arrest, and whether the Defendants had a valid basis to perform the search”).

27 ²Defendants also argue that Plaintiffs’ original proposed class definition is overbroad.
28 The Court addresses this argument in more detail below.

1 However, as the *Rattray* court itself noted, its decision was “against the weight of
2 authority granting class certification in strip-search cases.” *Rattray*, 253 F.R.D. at 465.
3 Indeed, citing two federal appellate court decisions and twelve district court decisions, the
4 court observed that “other courts have uniformly certified Rule 23(b)(3) classes in strip-
5 search cases over objections like those that the County raises here.” *Id.* at 461-62. At least
6 three other decisions, two from this district, granting class certification in strip-search cases
7 have been brought to this Court’s attention: *Tardiff v. Knox County*, 365 F.3d 1 (1st Cir.
8 2004); *Gallagher v. County of San Mateo*, Case No. C04-0448 SBA (N.D. Cal.), Oct. 31,
9 2005 Order (Ex. B to Merin Decl.); *Bull v. City & County of San Francisco*, Case No.
10 C03-1840 CRB (N.D. Cal.), June 10, 2004 Mem. & Order (Ex. A to Merin Decl.).
11 Defendants’ contention that there is a “recent trend of federal courts rejecting certification
12 under Rule 23(b)(3),” Opp’n at 12-13, is simply incorrect. To the contrary, this Court finds
13 that the great weight of authority supports certifying Plaintiffs’ proposed class.

14 Plaintiffs here challenge the constitutionality of a blanket strip search policy that did
15 not require any evaluation of individualized reasonable suspicion. *See, e.g.*, Pliler Dep. at
16 21:5-28:6 (Ex. D to Merin Decl.) (except for inmates falling within certain categories, such
17 as individuals who were being cite-released or those on two-day commitments, strip
18 searching was “part of the process to house people”); Ellison Dep. at 13:11-14:14 (Ex. E to
19 Merin Decl.) (under the policy at issue in this case, all individuals who were to be housed
20 pending arraignment were strip-searched). The legality of that policy, as well as whether
21 individualized reasonable suspicion is a defense to liability or a limitation on damages, are
22 common issues that predominate in this case.

23 The Court agrees with the district court in *Bull*, which explained that:

24 those that were subjected to searches based on individualized
25 reasonable suspicion are not included in the class. The issue of
26 whether a post hoc determination of reasonable suspicion is
27 sufficient to avoid a constitutional violation will not be addressed
28 at this time. Nonetheless, even if there is a post hoc
 determination of reasonable suspicion, that does not mean that an
 individual was not searched pursuant to a blanket visual body
 cavity strip search, the constitutionality of which will be
 determined in this litigation.

1 *Bull*, June 10, 2004 Mem. & Order at 11. As in *Bull*, “defendants acknowledge that there
2 was a . . . policy in place regarding strip searches, and it is this policy that plaintiffs
3 challenge. Thus, it is a fair guess that most arrestees were searched on that basis. . . . [A]ny
4 potential individualized issues can be addressed later in the litigation and do not defeat class
5 certification.” *Id.* Moreover, some issues that Defendants contend are individualized issues
6 – for example, “what crimes constitute an excludable crime involving violence, weapons, or
7 drugs” and “whether persons arrested on out of county warrants or for probation violations
8 [fall] outside the class,” Opp’n at 16 – appear to be issues that can and should be resolved on
9 a class-wide basis. *See id.* at 11-12 (noting that “numerous questions” remained to be
10 resolved, but explaining that “whatever is decided on those issues [] would seemingly affect
11 all class members”); Merin Reply Decl. ¶ 7 (discussing post-certification resolution of issues
12 on a class-wide basis in *Moyle v. County of Contra Costa*). The Court is also convinced that
13 membership in the class can, in the vast majority of cases, be easily ascertained by reference
14 to computerized records and file notations. While individualized inquiries may be necessary
15 in some cases, these inquiries appear neither to predominate nor to be unmanageable.
16 Accordingly, this Court concludes that common issues predominate over individualized
17 issues, and that a class action – at least at the liability stage of the proceedings – would be
18 manageable and superior to individual actions.

19 Finally, Defendants argue that Plaintiffs’ original proposed class definition is
20 overbroad. Plaintiffs agree with the majority of Defendants’ arguments and suitably
21 amended their proposed class definition on reply. Plaintiffs did not agree to exclude one
22 category of individuals that Defendants asserted must be excluded – individuals with “arrests
23 in connection with out-of-county arrest warrants or transfers to Contra Costa County Jail
24 from other Counties’ detention centers,” Opp’n at 21 – and this Court agrees that no such
25 exclusion is warranted at this time. Although this category was excluded from a class
26 certified in another strip search case, the plaintiffs in that case agreed that the exception was
27 “generally reasonable.” *Moyle v. County of Contra Costa*, Case No. C05-2324, 2007 WL
28 4287315, at *22 n.13 (N.D. Cal. Dec. 5, 2007). Defendants have not persuaded the Court

1 that, absent such agreement, this exclusion is required. However, this is not a definitive
2 ruling on the propriety of including such individuals in the class; instead, the Court finds
3 only that this is a disputed issue that, as noted above, can and should be resolved on a class-
4 wide basis.

6 **CONCLUSION**

7 In light of all of the above, the Court finds class certification to be appropriate and
8 hereby GRANTS Plaintiffs' second motion for class certification. Defendants do not dispute
9 that the requirements of Federal Rule of Civil Procedure 23(a) are satisfied, and the Court
10 rejects Defendants' objections to the suitability of certification under Rule 23(b)(3).

11 Pursuant to Plaintiffs' revised proposed class definition, the following class is hereby
12 certified:

13 All persons, since October 20, 2002, and continuing until
14 Defendants' prior custom and policy was brought into
15 compliance with the law on June 1, 2003, or such other more
16 recent date when the policy was implemented, who were arrested
17 on any misdemeanor or lesser charge not involving weapons,
18 controlled substances, or felony violence, and who were
19 subjected to a uniform and indiscriminate (blanket) strip/visual
20 body cavity search(es) by defendants before arraignment at the
21 Contra Costa County Jails without any individualized reasonable
22 suspicion that they were concealing contraband. This class may
23 also include arrestees who were subjected to subsequent blanket
24 strip searches before arraignment after the initial strip search,
25 without any reasonable individualized suspicion that they had
26 subsequently acquired and hidden contraband on their persons.

27 Also excluded from the class are those otherwise eligible
28 arrestees who (1) have a history of at least one prior conviction or
two prior arrests for excludable offenses within the last five
years; (2) have a current probation condition which includes
consent to search; (3) upon arrest or detention, exhibit behavior
or circumstances indicating they may be a danger to
himself/herself or others; [or] (4) are strip searched after
arraignment.

25 In addition, the Court has considered the criteria listed under Rule 23(g) and hereby appoints
26 the Law Offices of Mark E. Merin and Casper, Meadows, Schwartz & Cook as class counsel.
27 Because the Court has certified a class under Rule 23(b)(3), it must also "direct to class
28 members the best notice that is practicable under the circumstances, including individual

1 notice to all members who can be identified through reasonable effort,” and such notice must
2 include all of the information required by Rule 23(c)(2)(B). The parties shall meet and
3 confer and file, on or before **November 23, 2009**, either a jointly proposed class notice or a
4 joint statement setting forth the parties’ disputes over an appropriate class notice.

5 The parties shall also appear for a further case management conference on
6 **February 8, 2010**. They shall meet and confer and file a joint case management statement
7 on or before **February 1, 2010**.

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9 **IT IS SO ORDERED.**

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11 Dated: 11/02/09



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13 THELTON E. HENDERSON, JUDGE
14 UNITED STATES DISTRICT COURT
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