UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF NEW YORK

PHYLLIS A. MITCHELL, both individually and on behalf of a class of others similarly situated, Plaintiffs, v. THE COUNTY OF CLINTON, DAVID FAVRO, both individually and in his official capacity as Sheriff of the County of Clinton, JERRY MAGGY, both individually and as Undersheriff of the County of Clinton, and MICHAEL SMITH, both individually and as Major in the Clinton County Sheriff's Department, Defendants.	Civil Action No. 8:06-CV-00254 (NAM) (DRH)

MEMORANDUM OF LAW IN SUPPORT OF THE PLAINTIFF'S MOTION FOR CLASS CERTIFICATION

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TABLE OF AUTHORITIES

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I. INTRODUCTION

Arrested on minor charges and under circumstances not suggestive of reasonable suspicion, the plaintiff, Phyllis A. Mitchell ("Mitchell" or "Plaintiff"), was nonetheless strip searched upon her entry to the Clinton County Jail ("CCJ"), in violation of the Fourth Amendment of the United States Constitution and the clearly-established caselaw in this judicial circuit. Plaintiff alleges, and testimony from the Defendants and their employees confirms, that she endured this unconstitutional search because of Defendant Clinton County's policy and practice of strip searching every pre-trial detainee who entered the CCJ, without regard to the presence or absence of reasonable suspicion that such detainees were secreting contraband. Accordingly, numerous other similarly situated Clinton County pre-trial detainees suffered the same constitutional breach and traumatic experience. To put a stop to this unconstitutional practice and to obtain compensation for herself and all others similarly situated, the Plaintiff filed the within lawsuit on February 28, 2006 seeking declaratory and injunctive relief, class certification, monetary damages, and counsel fees. (Exhibit A).

The class action device, as provided under the Federal Rules of Civil Procedure, was designated for the exact situation presented to this Court – it provides a means of redress for many who would not have otherwise come forward to address the violation of their rights because of the expense and difficulties of individual litigation. Plaintiff satisfies the general requirements for certification of a class action, and furthermore will demonstrate to this Court the entitlement to certification of a damages class. Other federal courts, considering the exact situation presented to the Court in this motion, have not hesitated to certify class actions where police departments and local correctional facilities have applied a blanket strip search policy to pre-trial detainees. Plaintiff respectfully suggests that certification of this action as a class action is appropriate given case precedent, and given the facts underlying this lawsuit.

II. STATEMENT OF FACTS

A. Phyllis Mitchell's Arrest and Strip Search

Phyllis Mitchell is a 47 year old mother of six children, and has worked as a radiographer for the past fourteen years. (Exhibit B, 8:11-17)[1]. On March 27, 2003, Ms. Mitchell was arrested and placed in the Clinton County Jail on charges of Abandonment of Animals, Failure to Provide Proper Sustenance (two counts), and Failure to Provide Proper Food and Drink (to animals), all misdemeanors under New York's Agricultural and Markets law. (Exhibit B, 14:6-24; exhibit C).

Ms. Mitchell testified that, shortly after her arrival at the CCJ, she was moved into a room with lockers on the wall and directed to remove all of her clothing, including her brassiere and underpants. (Exhibit B, 48:5-11, 56:18-20, 58:16-21). The correction officer who performed the strip search, Stephanie LaTulipe, testified and confirmed Ms. Mitchell's account. (Exhibit D, 38:15-17, 39:5-9). Ms. Mitchell was also directed to remove the adult diaper she wore as a result of a bladder control condition (exhibit B, 53:14-17, 59 5-7), an occurrence unusual enough to give Officer LaTulipe a specific, unrefreshed recollection of Ms. Mitchell's strip search. (Exhibit D, 35:24-37:20, 39:12-22). While naked, Ms. Mitchell was instructed to "lift her breasts [and] completely strip naked and squat" to allow for a visual inspection of her vaginal and anal cavities. Exhibit B, 58:16-21; exhibit D, 41:8-17.

Officer LaTulipe strip searched Ms. Mitchell, just as she strip searched every arriving pre-trial detainee, in order to ensure that she did not possess any contraband. (*Id.,* 31:22-24). However, Latulipe acknowledged that she had no reason to believe that Ms. Mitchell was concealing weapons or contraband (*id.*, 45:5-16), and no such contraband was found on Ms. Mitchell. (*Id*., 42:23-24). The reason Ms. Mitchell was subjected to this humiliating procedure is undisputed, since the County

[1] All citations to deposition testimony herein will be in the format page number:line number.

of Clinton and its correctional officers testified that at the time of Ms. Mitchell's booking, Defendants had an unconstitutional policy of strip searching every pre-trial detainee who entered the CCJ.

B. The County's Blanket Strip Search Policy

1. Three CCJ Corrections Officers Testified There Was Such A Policy

Three correctional officers who were responsible for booking new detainees into the CCJ testified that there was indeed policy of strip searching each arriving detainee. Latulipe testified that she began working at the CCJ in 1992 (exhibit D, 16:8-12) and was assigned to booking within 6 to 12 months of her arrival. (*Id*., 16:23–17:1). At that time, arriving detainees were brought into the intake office, where booking paperwork was completed, and the detainee was permitted a telephone call. The inmate would be pat-searched during this part of the procedure. (*Id.,* 28:19-29:4). The detainee was then brought to a room known as the inmate locker room. (*Id.,* 26:8-27:10). There, the detainee would be directed to remove all of her clothing, and while naked, lift her breasts and feet for inspection, open her mouth for inspection, and squat down and cough. (*Id*., 31:4-14). The officer would be standing in front of the detainee, observing her throughout the entire strip search (*id*., 31:15-21), and would search the detainee's clothing once it was removed. (*Id*., 32:15-16). Officer Latulipe followed this procedure for every detainee she booked into the facility during the 2002-2003 time period. (*Id.,* 33:6-9). The purpose of this strip search was to prevent the introduction of contraband into the facility. (*Id*., 31:22-24). However, she never found contraband on an arriving inmate during the time she admitted using this procedure. (*Id*., 43:1-4).

Michael Galarneau testified that he has been a CCJ correction officer since approximately 2001. (Exhibit E, 6:9-11). He was first assigned to booking prior to 2003, and during that time period worked booking as a fill in between once a week and once a month. (*Id.,* 10:10-11:4).

Galarneau testified, just as Latulipe did, that arriving detainees are pat frisked, and then asked questions in order to fill out booking paperwork. (*Id*., 12:3-24). The booking officer then takes a photograph of the detainee (*Id*, 13:2-4). Following the photograph, the detainee would be taken into the inmate locker room, where the correction officer would direct the detainee to remove all of his clothing, and while naked bend over and spread the lobes of his buttocks, lift his arms, open his mouth, and run his fingers through his hair. (*Id*., 13:18-15:14).

Michael Clukey testimony was consistent with Latulipe's and Galarneau's. Clukey first started work in the intake area prior to 2003 (exhibit F, 10:3-19). He testified that, prior to October of 2003, each arriving pre-trial detainee was taken into the locker room, after the booking paperwork was filled out, and strip searched. (*Id.*, 14:11-15:3). Each detainee was required, while naked, to raise his hands, run his fingers through his hair, lift his testicles, raise the bottoms of his feet, and bend over. (*Id*., 15:4-10). The clothing that the detainee removed was also searched by the officer. (*Id.*, 57:9-11). This procedure was followed for each detainee, regardless of the criminal charge and regardless of whether Officer Clukey believed the detainee was hiding contraband. (*Id*., 15:11-16:1). Clukey was taught to follow this procedure when he was hired in 1996. (*Id*., 16:8-17). The purpose of the strip search was to prevent the introduction of contraband into the facility (*id*., 57:4-6), but Clukey testified that he had never found contraband on a detainee as the result of performing a strip search. (*Id*., 56:22-24).

2. The CCJ Written Intake Policy Was Also Unconstitutional

Before October 2003, the intake searches at the CCJ were governed by two written policies: Policy No. C-102, "Implementing and Maintaining the Admissions Process" (exhibit G), ("admissions policy") and Policy No. D-221, "Strip Search Procedures" (exhibit H) ("strip search policy"). The admissions policy provides that a "miscellaneous officer" is responsible for strip

searching and issuing jail clothing to inmates, but does not provide instruction on how the search is to be done, nor does the policy state that a strip search on intake may only be done if supported by reasonable suspicion. (Exhibit G at 6).

The strip search policy states that only "certain inmates" will be searched at the time of admission, based on reasonable suspicion. (Exhibit H, p. 1). However, the policy goes on to define "reasonable suspicion" in a rigid way that both removes all discretion from the search officer as to who to strip search, and prevents consideration of the particular, individual circumstances of each detainee. A "reasonable suspicion" chart lists fifteen factors, the presence of any one of which will lead to a strip search. The chart provides, among other things, that any detainee charged (either in the present or the past) with any offense involving violence or illegal drugs will be strip searched upon admission. Any detainee who was intoxicated upon arrival would also be strip searched. (*Id*., p. 1-2). The strip search policy also contains a "Table of Strip Searchable Penal Law Offenses," which provides that arriving detainees charged with certain offenses will be automatically strip searched. Included in that table are the misdemeanor charges of third-degree assault; third degree menacing, second degree unlawful imprisonment, criminal possession of a controlled substance in the seventh degree, and the violations of unlawful possession of marijuana and disorderly conduct. (*Id*., p. 5). Michael Smith, the CCJ Administrator and the County of Clinton's deponent pursuant to F.R.C.P. 30(b)(6), testified that the list of reasonable suspicion factors provided "the reasoning to conduct some strip searches at that time." (Exhibit I, 82:17-20).

Given the breadth of the written policy, and the large percentage of arriving detainees who would be automatically strip searched under its terms, it is perhaps not surprising that the correction officers testified that they were completely unfamiliar with the written policy, and did not refer to it in conducting the blanket strip search policy. Officer Galarneau testified that he had only

skimmed the written policies when he was first hired (exhibit E, 34:1-8) and could not recall having seen the strip search policy before it was shown to him at his deposition. (*Id*., 37:14-19). Officer Clukey had not looked at the policy manual since the time he was hired approximately 10 years ago (exhibit F, 18:4-7, 7:7-8) and was not familiar with the "Table of Strip Searchable Offenses" (*id*., 19:3-17). Latulipe also had never seen the strip search policy prior to her deposition. (Exhibit D, 25:16-23).

C. The Alleged October 2003 Change in Policy

On October 24, 2003, Major Smith wrote a memorandum purporting to revise the inmate strip search policy. (Exhibit J). This memo stated in part as follows:

> Due to a recent Court decision… regarding inmate strip searches the following is effective immediately. The Clinton County jail shall not maintain a "blanket" strip search policy regarding newly admitted inmates. All newly-arrived pre-trial (unsentenced) detainees upon their initial admission to the jail shall not be strip searched unless the officer has a "reasonable suspicion" that the inmate is concealing weapons or other contraband. The decision to strip search shall not be based upon any one factor such as crime committed or degree. Officers shall base their decision on several factors such as crime charged, particular characteristics of the arrestee, and/or the circumstances of the arrest… This memorandum supersedes current Department Policy regarding any provisions defining when newly admitted inmates may be strip searched.

See also exhibit I, 72:18-74:16.[2] Major Smith testified that corrections officers were not provided with copies of the memorandum, but that it was read aloud at pre-shift briefings. (*Id*., 74:20-75:6). No follow-up training or instruction was given. (*Id.,* 75:18-22). Officer Clukey confirmed that he did not receive a copy of this memorandum, but only heard about it from his sergeants (exhibit F, 37:5-10).

However, it is clear from the testimony of the corrections officers that the October 23, 2003

[2] Major Smith testified that the memo merely confirmed old Jail policy inasmuch as blanket strip searches were impermissible. The testimony of Clinton County Jail correctional officers *supra*, severely discredits this testimony.

memorandum did not mark the end of the CCJ's unconstitutional strip search policy. First of all, the memo was not effective at changing the attitudes of the CCJ correction officers. Latulipe testified that fellow officers disagreed with the memo, and that "it's hard for people to take change." (Exhibit D, 77:6-14). This change was undoubtedly made more difficult by the lack of any follow-up instruction. In addition, little about the booking process seemed to change immediately after the memo. Arriving detainees were still changed into their jail uniform in the inmate locker room. There was no curtain or other provision for inmate privacy in place at that time. (Exhibit E**,** 21:1-2; exhibit F**,** 24:18-22, 22:11-16). Officer Galarneau testified that at that time he would stand in the doorway and observe the detainee as they changed into their jail uniform, in order to prevent the introduction of contraband into the facility. (Exhibit E, 20:22-21:16, 24:17-25:3, 26:10-18).[3] For her part, LaTulipe testified that the intake officer could observe the detainees while they were changing if they chose to. (Exhibit D, 93:22-24).[4] Clothing changes were later done in a hallway near the sallyport (exhibit E**,** 23:15-24) and in an officer's bathroom (*id.,* 25:4-24, exhibit F, 30:21-23). Neither of those locations contained a curtain for privacy during the clothing change. (*Id.,* 22:11-16, 30:24-31:2; exhibit E, 21:1-2, 26:1-4; exhibit D**,** 103:17-21).

Significantly, the written policies governing admissions and strip searches were not revised until several years later, and were not made available to correctional officers until January of 2006. (Exhibit I, 113:23-25). Until that time, the prior, unconstitutional policies remained in effect. (*Id.,* 114:1-10). The revised policies, on their face, appear to be constitutional. (Exhibits K and L).

According to Major Smith, from February 28, 2003 through the present, inmates were permitted to change from their street clothing into a jail uniform in private. Exhibit I, 116:4-8.

[3] Clukey did not admit observing the detainees changing, but testified he would stand in the doorway and not observe the detainee. (Exhibit F, 25:5-11).

[4] Officer LaTulipe stated that she did not chose to watch inmates change because the October 24, 2003 memo stated that probable cause was required to strip search a newly admitted inmate. (Exhibit D, 94:6-11).

However, as shown *supra* this testimony is discredited by the testimony of Officers Latulipe, Galarneau and Clukey, who confirm that before Major Smith's October 24, 2003 memo, the County of Clinton conducted blanket strip and visual cavity searches on *all* new detainees admitted to the CCJ. In short, at least for eight months of the class period, even the County's employees agree that each and every individual admitted to the Clinton County Jail was forced to undergo a strip search, including a visual examination of their body cavities.

III. ARGUMENT

THIS COURT SHOULD CERTIFY THIS ACTION, ON EITHER A FULL OR PARTIAL BASIS, AS A CLASS ACTION

Phyllis Mitchell seeks to represent a class of thousands of individuals, many of whom are poor and disenfranchised, who had (and who will have) their civil rights unnecessarily violated by the uniform strip search practices of Clinton County. Having obtained compelling documentary and testimonial proof, Plaintiff now moves for certification of the following two subclasses:

Class (a)

> All persons who were placed into the custody of the Clinton County Jail after being charged with misdemeanors, violations, violations of probation or parole, traffic infractions, civil commitments or other minor crimes and were strip searched upon their entry into the Clinton County Jail pursuant to the policy, custom and practice of the Clinton County Sheriff's Department and the County of Clinton, *from February 28, 2003 until October 24, 2003*. Specifically excluded from the class are Defendants and any and all of their respective affiliates, legal representatives, heirs, successors, employees or assignees.

Class (b)

> All persons who were placed into the custody of the Clinton County Jail after being charged with misdemeanors, violations, violations of probation or parole, traffic infractions, civil commitments or other minor crimes and were strip searched upon their entry into the

> Clinton County Jail pursuant to the policy, custom and practice of the Clinton County Sheriff's Department and the County of Clinton, *from October 24, 2003 through the date on which the Clinton County Sheriff's Department and/or the County of Clinton cease or ceased, or are enjoined from, enforcing their unconstitutional policy, practice and custom of conducting strip searches absent reasonable suspicion*. Specifically excluded from the class are Defendants and any and all of their respective affiliates, legal representatives, heirs, successors, employees or assignees.

For the ease of manageability, each of the two subclasses should be certified, for different factual disputes exist as to each of the time periods set forth above. The evidence is clear that from February 28, 2003 until October 24, 2003, before Major Smith's memo, the County engaged in a policy of strip searching all inmates. A separate class should be certified for the period after October 24, 2003.

The Court may certify a case for class action treatment where the plaintiff can demonstrate that the threshold requirements of Fed. R. Civ. P. 23(a) (numerosity, commonality, typicality and adequacy of representation) are satisfied, and that the class satisfies one of the three criteria set forth in Fed. R. Civ. P. 23(b)[5]. *Marisol A. v. Giuliani,* 126 F.3d 372, 375-76 (2d Cir. 1997). Here, Plaintiff easily satisfies each these threshold requirements and requests that the Court certify this action as a money damages class under Fed. R. Civ. P 23(b)(3), or, in the alternative, as an injunctive relief class action under 23(b)(2). Should the Court find that full certification is not appropriate, Plaintiff requests partial certification relative to the issues common to the class: the existence of a blanket strip search policy at the Clinton County Correctional Facility and the liability of Clinton County for that policy.

As will be outlined more thoroughly below, numerous federal courts in at least seven

[5] The Second Circuit in *In re IPO Litig*., 471 F.3d 24 (2d Cir. 2006) clarified the standards for certifying a class action, holding that a court must be satisfied that the factual basis for each of the Rule 23 factors has been met. Given that the Plaintiff has developed compelling evidence not just in support of the Rule 23 factors, but the merits of her claim, *In re IPO* is no impediment to class certification in this case.

circuits, when considering situations where municipalities employ blanket strip search policies, have not hesitated to certify those actions as class actions.[12]

A. The Proposed Class Satisfies the Numerosity Requirement of Rule 23(a)(1).

Rule 23(a)(1) requires that the class be "so numerous that joinder of all members is impracticable." Plaintiff is not required to detail, to the person, the exact size of the class or demonstrate that joinder of all class members is impossible. *Robideaux v. Celani,* 987 F.2d 931, 935 (2d Cir. 1993) ("[i]mpracticable does not mean impossible"); *Civic Ass'n of Deaf v. Giuliani,* 915 F. Supp. 622, 632 (S.D.N.Y. 1996) ("precise quantification of the class members is not necessary because the court may make 'common sense assumptions' to support a finding of numerosity") (internal citations omitted). Instead, Plaintiff need only provide the Court with a reasonable estimate as to the size of the class. *McLean v. Merrifield*, 2002 U.S. Dist. LEXIS 12753, *17 (W.D.N.Y. June 28, 2002).

Here, Smith testified that there were approximately 1300-1400 bookings a year into the CCJ, of which about half were misdemeanors. (Exhibit I, 12:9-20, 19:8-10). This would give a class size of approximately 900 individuals for the first subclass, and many times that number for the second, depending upon what date was found after trial to be the date the unconstitutional policy ceased. Numerosity is therefore satisfied. *Consolidated Rail Corp. v. Town of Hyde Park*, 47 F.3d 473, 483 (2nd Cir. 1995) ("Where the proposed class consists of at least forty members … the numerosity

[12] **First Circuit:** *Tardiff v. Knox County*, 365 F.3d 1 (1st Cir. 2004); *Mack v. Suffolk County*, 191 F.R.D. 16 (D. Mass. 2000); **Second Circuit:** *Dodge v. County of Orange*, 226 F.R.D. 177 (S.D. N.Y. 2005); *Marriott v. County of Montgomery*, 227 F.R.D. 159 (N.D. N.Y. 2005); *Maneely v. City of Newburgh*, 256 F. Supp. 2d 204 (S.D.N.Y. 2003); *Spinner v. City of New York*, 2003 U.S. Dist. LEXIS 19298 (E.D.N.Y. Oct. 6, 2003); **Fourth Circuit:** *Smith v. Montgomery County,* 643 F. Supp. 435 (D. Md. 1986); **Sixth Circuit:** *Eddleman v. Jefferson County,* 1996 U.S. App. LEXIS 25298 (6th Cir. Aug. 29, 1996) (unpublished); **Seventh Circuit:** *Blihovde v. St. Croix County,* 219 F.R.D. 607 (W.D. Wis. 2003); *Doan v. Watson,* 168 F. Supp. 2d 932 (S. D. Ind. 2001); *Doe v. Calumet City,* 754 F. Supp. 1211 (N. D. Ill. 1990); **Eleventh Circuit:** *Haney v. Miami Dade County*, 2005 U.S. Dist. LEXIS 27739 (S.D. Fla. Oct. 6, 2005); **D.C. Circuit:** *Bynum v. District of Columbia*, 384 F. Supp. 2d. 342 (D. D.C. 2005).

requirement is presumed to be satisfied").

B. There are Numerous Questions of Law and Fact Common to the Class.

Rule 23(a)(2) requires that there be "questions of law or fact common to the class." "The commonality requirement is met if plaintiffs' grievances share a common question of law or of fact." *Marisol A.,* 126 F.3d at 376. Plaintiff is not required to show that all class members' claims are identical to each other, and any differences between the proposed class members, "while arguably relevant as defenses to liability, do not change the fact that this class action raises the same basic claim and shares common questions of law." *Mack,* 191 F.R.D. at 22-23 (allowing certification of strip search class action despite "varying defenses to liability which may be raised regarding particular individuals"); *Daniel v. Am. Bd. of Emergency Med.,* 269 F. Supp. 2d 159, 189 (W.D.N.Y. 2003) (noting that Rule 23, "does not require that every issue in the case be similar to every other issue presented by each class member's case … the court's inquiry is directed primarily to class wide questions of liability"); *LaFlamme,* 212 F.R.D. 448, 453 (N.D.N.Y. 2003) ("commonality is not precluded by the possibility that the proof required to demonstrate injury might be highly individualized") (internal quotation marks omitted). Indeed, a single common question is sufficient to satisfy the requirements of Rule 23(a)(2). *See generally In Re Agent Orange Prod. Liab. Litig.,* 818 F.2d 145 (2d Cir. 1987). A party is entitled to certification where the class claims arise "from a common nucleus of operative facts regardless of whether the underlying facts fluctuate over the class period and vary as to individual claimants." *Haywood,* 109 F.R.D. 568, 577 (internal quotation marks omitted).

Here, Plaintiff has satisfied the requirements of commonality. The central focus of Ms. Mitchell's claims against Clinton County are that both she and all members of the proposed classes were illegally strip searched upon their entry into the CCJ, in violation of the Fourth Amendment.

Plaintiff has offered compelling evidence, including correction officer testimony, that all individuals admitted to the Jail were, subjected to the visual inspection of their naked bodies upon admission. Ms. Mitchell for her part testified that she was subjected to this procedure upon admission to the CCJ.

There is some evidence, from the correction officer's testimony, that at some time after October 24, 2003, the intake strip search of pre-trial detainees evolved from a full-blown strip search with inspection of the body's cavities to the observation of the detainee while changing clothes. Such a procedure is nevertheless unconstitutional. The visual inspection by a corrections officer of a naked, pre-trial detainee is a strip search which must be supported by individualized, reasonable suspicion:

> Although strip searches often may involve additional steps, we decline to draw the line so narrowly that standing naked for inspection by officers falls short of being a strip search if unaccompanied by a demand to open one's mouth or lift one's arms. Unquestionably, the serious intrusion stems from exposing one's naked body to officer scrutiny; the impact of that forced nudity is undervalued if focused attention on the mouth and underarms is also required to reach the threshold of a strip search.

Wood v. Hancock County Sheriff's Department, 354 F.3d 57, 63 (1st Cir. 2003); *see also Owens v. County of Del.,* Civ. A. No. 95-4282, 1996 U.S. Dist. LEXIS 17098, *58, n. 22 (E.D. Pa. Aug. 15, 1996) ("The [Tenth Circuit] held that because plaintiff was thus 'forced to disrobe, we consider this to be a strip search. We do not think it necessary to distinguish between searches of this type and visual body cavity searches. The standard adopted is applicable to all strip searches.' Similarly, here, [where plaintiff was allowed to remain in underwear], I regard the search performed on plaintiff as a strip search."); *Gonzalez v. City of Schenectady,* 141 F. Supp.2d 304, 308 (N.D. N.Y. 2001) (requiring reasonable suspicion for search of a woman who claimed officers "required

her to lower her pants (but not her underwear) and raise her shirt (but not take off her bra)); *Lopez v. City of New York,* 901 F. Supp. 684 (S.D.N.Y. 1995) (rejecting defendants' argument "that searches that stop short of complete nakedness are reasonable per se," court applied Fourth Amendment reasonableness test to allegations that plaintiffs were asked to remove clothing and were touched by officers, but were not naked at any point); *Mason v. Village of Babylon,* 124 F. Supp. 2d 807, 811 (E.D.N.Y. 2000) (court found that search where plaintiff was "asked to lift her shirt, lower her pants and, as put by the County 'rearrange her undergarments'" violated the Fourth Amendment); *Huck v. City of Newburgh,* 275 A.D. 2d 343, 712 N.Y.S. 2d 149 (App. Div. 2000) (applying *Weber* reasonable suspicion analysis where plaintiff "asked to remove all her outer garments, and while her underwear was still on, she was asked to lift her bra and expose her breasts"); *Marriott v. County of Montgomery*, 227 F.R.D. 159, 169 (N.D.N.Y. 2005) ("admitees are required to strip naked in front of a CO and submit to the observation of their body by the CO. This procedure squarely fits both the common and legal definitions of strip search.")

As such, this class action has two common issues that are of central importance to members of each of the proposed subclasses: a) did the Clinton County Jail employ a suspicionless strip search policy and/or practice during the class period; and b) are Clinton County and the remaining defendants responsible for these constitutional violations. Class members in the post-October 2003 subclass also share the common question of when and if the unconstitutional policy came to an end. Moreover, the evidence illustrates that Defendants had a policy – either written or a de facto practice – of strip searching (including a visual cavity search) everyone admitted to the Jail at least as of February 28, 2003, and that Plaintiff and the putative class members were in fact strip searched by Defendants during this time frame. Commonality is, accordingly, satisfied. *Marriot*, 227 F.R.D. at 172.

Class certification is appropriate given these common questions, regardless of whether subtle variations in circumstances amongst individual class members exist. *Eddleman v. Jefferson County*, 1996 U.S. App. LEXIS 25298, *12-13 (6th Cir. Aug. 29, 1996) (commonality is present even where some class members were "subject to a full strip search instead of a partial one, or the fact that some individuals may fail to meet the qualifications for the class because it can be shown that there was reasonable suspicion to search them[;] ... isolated instances of non-commonality are not grounds for denying class certification"); *Blihovde,* 219 F.R.D. at 616 (certifying strip search class action where "department policy suggests that some arrestees were visually inspected while others were searched more intrusively").

Defendants may claim that factual disputes (for at least part of the proposed class period) about whether there was in fact a blanket strip search policy at the CCJ precludes class certification because of the *IPO* decision. However, *IPO* does not require the Court to resolve this factual dispute (if it exists) at this time. What the *IPO* decision requires before a class may be certified, rather, is that the Plaintiff show that the proposed class shares a common question of law or fact, not that the common question must be resolved in favor of the class. Adjudicating this issue would be to go beyond that which is necessary to the Rule 23 analysis, which is not to be done at the class certification stage. *See IPO, supra* at 41 ("in making such determinations, a district judge should not assess any aspect of the merits unrelated to a Rule 23 requirement.") What matters is the existence of the common issue, not its resolution. The First Circuit held as much in a similar case:

> In this case, whether there was a rule, policy or custom of automatically strip searching all or most categories of arrestees is on its face a common disputed issue--as both sides concede. Nothing here obliged the district courts to do more than view the issue as such and, so viewed, it weighs in favor of class action status.

Tardiff v. Knox County, 365 F.3d 1, 5 (1st Cir. 2004). Thus, because the disputed question of the

existence of a blanket strip search policy (*de facto* or otherwise) is nothing more than a common predicate to liability for all putative class members and not a requirement of FRCP 23, under *IPO* the Court cannot and should not resolve any merits dispute on this issue.

Plaintiffs have submitted ample evidence to support a reasonable jury's conclusion that the defendants had a *de facto* policy to strip search everyone admitted to the CCJ. The totality of the evidence clearly permits a rational fact-finder to conclude that the defendants had a *de facto* policy - indeed, an actual practice - of strip searching every new admittee to the Holding Center. The evidence submitted to the Court thus illustrates that all of the requirements of FRCP 23 are satisfied in accordance with *IPO*. Should the Court have doubts about who to believe and which testimony to credit among the documentary evidence submitted, it bears noting that *IPO* did nothing to alter the long-existing practice and precedent that courts "should resolve all doubts about whether a class should be created in favor of certification." *Pyke v. Cuomo,* 209 F.R.D. 33, 41 (N.D.N.Y. 2002); *see also Green v. Wolf Corp.,* 406 F.2d 291, 298 (2d Cir. 1968).

Under circumstances such as these, where all class members raise common questions of law and assert the same claims as a result of the same unlawful strip search policy, the element of commonality has clearly been established.

C. The Claims of the Representative Plaintiff are Typical of the Claims of the Class at Large.

Rule 23(a)(3) requires that the representative plaintiff's claims be "typical" of those of the other class members. "The commonality and typicality requirements of Rule 23(a) tend to merge." *Gen. Tel. Co. of the Southwest v. Falcon*, 457 U.S. 147, 157, n. 13 (1982). The typicality requirement "is satisfied when each class member's claim arises from the same course of events, and each class member makes similar legal arguments to prove the defendant's liability." *Marisol*

A., 126 F.3d at 376. "Factual differences will not prevent class certification where the claims arise from a common legal theory," and the fact that class members may have differing defenses is of no import; – "the position that typicality is not satisfied with respect to defenses faced by class members is untenable." *LaFlamme*, 212 F.R.D. at 454 (internal quotations and citations omitted); *see also Blihovde*, 219 F.R.D. at 617 (applying this principle to a strip search class action). A class representative should "have the incentive to prove all of the elements of the cause of action which would be presented by the individual members of the class were they initiating individual actions." *Dietrich v. Bauer*, 192 F.R.D. 119, 124 (S.D.N.Y. 2000) (internal quotations marks and citations omitted).

Here, Mitchell's claims are typical of members of the proposed class. They arise from the same course of events and Mitchell must make similar arguments to prosecute her claims as would be made by members of the proposed class. Typicality is satisfied because the class representative alleges similar circumstances regarding her wrongful strip searches.

D. Plaintiff and Her Counsel Will Fairly and Adequately Represent the Class.

Rule 23(a)(4) requires that the class representative "fairly and adequately protect the interests of the class." Adequate representation depends on two factors: (a) the plaintiff's attorney must be qualified, experienced and generally able to conduct the proposed litigation; and (b) the class members, and especially the representative party, must not have interests antagonistic to one another. *In re Joint Eastern and Southern Dist. Asbestos Litigation*, 78 F.3d 764, 778 (2d. Cir. 1996). Both prerequisites of adequacy of representation are met in the instant case.

Ms. Mitchell seeks to bring an end to the illegal strip searches at the CCJ and is further committed to obtaining appropriate compensation from Defendants for both herself and members of the proposed class. Ms. Mitchell has come forward to represent the class despite great personal

pressure and pain – being subjected to a situation as humiliating as a strip search and then being forced to relive it would be difficult for anyone. Her interest in stopping the Defendants' unconstitutional practice, and in obtaining compensation, is identical to that of the putative class members. Accordingly, there is no antagonism or conflict presented in appointing Phyllis Mitchell as the class representative. Indeed, in nearly identical circumstances, and given the common legal and factual issues, courts have deemed plaintiffs in similar cases to be adequate class representatives. *See*, *e.g., Marriott, supra at* 172.

The class is also represented by competent and experienced counsel who have invested considerable time and resources into the prosecution of this action, and have gathered compelling evidence regarding the systematic strip search practices carried our over a period of time in Erie County. Attorney Bob Keach has litigated a number of federal civil rights cases before the U.S. District Court for the Northern District of New York,[6] and has also served as lead, local or co-counsel in several class actions including: *Hytten v. Volkswagen of America* (Sup. Ct., Otsego Co.) (National settlement of warranty fraud litigation); *Kelsey v. County of Schoharie*, No. 04-CV-1324 (LEK/DRH) (strip search class action regarding Schoharie County Correctional Facility, co-counsel with present Class Counsel); *Wies v. Bridgestone/Firestone, Inc.*, No. 00-CV-1242 (TJM/DRH) (defective firestone tires, later transferred by the Judicial Panel on Multi-district Litigation to the Southern District of Indiana); and *Frank v. Goodyear Tire Rubber Co.*, No. 02-CV 0985 (LEK/RFT) (transferred by Judge Kahn to the District of New Jersey to facilitate settlement).

Jonathan W. Cuneo and Charles J. LaDuca of Cuneo Gilbert & LaDuca, LLP, have extensive experience in state and federal trial and appellate courts, before law enforcement authorities and in

[6] *See Curry v. City of Syracuse*, 316 F.3d 324 (2d Cir. 2003); *Lewis v. Gagne*, No. 02-CV-0219, 2003 WL 22006403 (N.D.N.Y. August 20, 2003); *Selah v. Goord*, 255 F. Supp.2d 42 (N.D.N.Y. 2003); *Flaherty v. Seroussi, 209 F.R.D. 295 (N.D.N.Y. 2001).*

proceedings before the United States Congress. Cuneo and LaDuca have successfully prosecuted complex class actions, including cases involving securities fraud, antitrust violations, consumer protection and products liability in state and federal courts throughout the United States. Specifically, Cuneo and LaDuca were sole co-lead counsel in the Entran II product liability litigation, which yielded a settlement of $324 million and covered all 50 states and Canada. Also, Cuneo was lead counsel in the Hungarian Gold Train case, which in September 2005 resulted in the creation of a settlement fund of $25.5 million for Hungarian Holocaust survivors. In addition to this experience, Cuneo and LaDuca are co-counsel in several strip search class actions with Mr. Keach, one of which was recently certified in the United States District Court for the Northern District of New York against the County of Schenectady and other related Defendants.

Jason Rozger and Bruce Menken of Bernbaum Menken Ben-Asher & Bierman, LLP have extensive experience with civil rights and civil liberties litigation, and have been found to be adequate class counsel in several similar class actions in this district. *See Marriott, supra; Kahler v. County of Rensselaer,* 03 CV. 1324 (TJM)(DRH); *McDaniel v. County of Schenectady,* 04 CV. 0757 (GLS)(RFT) (preliminary approval of settlement).

Gary E. Mason and Alexander E. Barnett of the Mason Law Firm, P.C. have extensive experience in scores of class action lawsuits and complex litigation such as this. Mr. Mason has served as either lead or co-counsel in scores of class action lawsuits, including *In Re Diet Drugs Prod. Liab. Litig., In Re the Exxon Valdez, In Re Synthetic Stucco (EIFS) Prod Liab. Litig.* and *In Re Swanson Creek Oil Spill,* and the Entran II product liability litigation (*Galanti v. Goodyear Tire & Rubber Co.*, No. 03-CV-209, D.N.J.). Mr. Barnett of The Mason Law Firm has litigated numerous class actions, including *In re Diet Drugs Prod. Liab. Litig.,* 282 F. 3d 220 (3rd Cir. 2002), the Entran II litigation, *In re Bridgestone/Firestone Inc., ATX, ATX II and Wilderness Tires Products*

Liability Litig., MDL No. 1371 (S.D. In.); *Turner v. General Electric Company.*, No. 2:05-CV-186-FtM-33DNF (M.D. Fla.); and *Staton, et al. v. Irving Materials, Inc., et al.*, No. 03-CI-588 (Ky. Cir. Ct., 4th Judicial Cir., Hopkins City 2005).

In short, the Phyllis Mitchell is an adequate class representative and has retained experienced class counsel that has and will continue to aggressively litigate this action. Plaintiff has satisfied this requirement for certification.

E. Plaintiff Has Satisfied the Requirements for a Money Damages Class Under Rule 23(b)(3), as the Common Issues Shared by Class Members Predominate Over Individual Issues and A Class Action is the Superior Method by Which to Prosecute this Case.

Rule 23(b)(3) permits certification when "the court finds that the questions of law or fact common to the members of the class predominate over any questions affecting only individual members, and that a class action is superior to other available methods for the fair and efficient adjudication of the controversy."

The party proposing a class action must establish that issues common to the class predominate over the individual issues of particular class members. *Amchem Prod. v. Windsor*, 521 U.S. 591, 623 (1997). The predominance requirement of Rule 23(b)(3) is satisfied once the plaintiff establishes that "the issues in the class action that are subject to generalized proof, and thus applicable to the class as a whole ... predominate over those issues that are subject to only individualized proof." *Visa Check,* 280 F.3d at 136. The most pragmatic way for the Court to make this determination is to evaluate whether "common proof will predominate at trial." *In Re NASDAQ Market Makers*, 169 F.R.D. 473, 517 (S.D.N.Y. 1996); *see also In re Plastics Additives Antitrust Litig.*, Civ. Act. No. 03-2038, 2006 U.S. Dist. Lexis 69105, *18 (E.D.Pa. Sept. 1, 2006) ("satisfaction of the predominance prong of the class certification standard does not require plaintiffs

to prove evidence establishing each element of their cause of action at the class certification stage, but, instead, requires plaintiffs to make a threshold showing that each element of their claim may be proven through common, class-wide evidence, rather than through evidence particular to each member of the class.").

Here, all of the proposed class members' claims revolve around one central legal issue: did the CCJ maintain an unconstitutional policy of strip searching every pretrial detainee admitted to the CCJ, without regard to reasonable suspicion that the detainee was concealing contraband? The proposed class members' claims also share common factual issues – did such a practice exist during the two class periods, how long did the practice exist, and is the County of Clinton responsible for this practice? Clearly, legal and factual issues in this litigation predominate over any individual issues. The Second Circuit has concluded that the predominance and superiority requirements of Rule 23 are satisfied in this kind of strip search case. Specifically, in *In Re: Nassau County Strip Search Cases*, 461 F.3d 219 (2d Cir. Aug. 24, 2006), the court reversed the district court's denial of class certification in a similar strip search case and ordered the district court to certify a class – at least for liability purposes – because the issue of whether the county's blanket strip search policy violated the law predominated all individual issues in the case and adjudication of liability in a single proceeding was the superior method of managing the case. *Id.* at 230-31. The determination in *In Re Nassau County* that cases concerning policies of strip searching everyone brought to correctional facilities satisfy the requirements of FRCP 23(b)(3) is not impacted by *IPO*. Accordingly, Plaintiffs satisfy FRCP 23(b)(3).

Defendants may claim that the need to analyze the existence of reasonable suspicion for each class member is an issue that predominates over any other common issues. This argument fails for two reasons. First, the metaphysical possibility that some of the class members may, at the time of

their arrests, have had characteristics that might add up to reasonable suspicion to conduct a strip search is irrelevant to the events that routinely occurred at the CCJ: the complaint alleges and the evidence shows that the County's practice did not (and does not) consider the presence or absence of reasonable suspicion when conducting strip searches at admission. Similarly, the deposition testimony cited herein confirms that for at least part of the class period, corrections officers did not make any inquiry as to reasonable suspicion before strip searching an arrestee – *all detainees were strip searched*. It would be disingenuous at best for correction officials to claim the possibility of facts supporting reasonable suspicion to conduct a strip search if they did not, in the first instance, make an inquiry as to this point. *See Dodge v. County of Orange*, 226 F.R.D. 177, 182 (S.D.N.Y. 2005) ("If individualized assessments were in fact not made, then all the searches were illegal, because each new arrival was constitutionally entitled to an individualized assessment of his or her circumstances… [T]he fact that a particular class member could have been lawfully strip searched if [the correctional facility] had made the constitutionally required assessment is a defense to a particular class member's claim for damages, not a defense to the class-wide claim that the County searched everyone without making any assessment at all."); *Lee v. Perez*, 175 F. Supp.2d 673 (S.D.N.Y. 2001) (directed verdict entered for strip search plaintiff where search officer could not state reasons for search and the fact that there could be *post hoc* factors that might support reasonable suspicion was irrelevant).

Second, even if issues of reasonable suspicion do exist, they do not predominate over the common issues of law and fact. As noted by the United States Court of Appeals for the Sixth Circuit:

> Defendants argue that because the reasonableness of any search must be examined on a case by case basis, the constitutionality of strip searches cannot be properly evaluated in a class action. *The basis for the complaint, however, arises precisely*

> *because the Defendants did not conduct an individualized assessment of the need for each search*. Plaintiffs allege ... their constitutional rights were violated by a policy or custom, written or unwritten, to search every arrestee who entered the Correctional Facility, regardless of the individual circumstances. Due to the single legal theory and the similar facts for each Plaintiff, a class action would be superior to individual actions.

Eddleman v. Jefferson County, 1996 U.S. App. LEXIS 25298, *15 (6th Cir. Aug.27, 1996) (emphasis added); *Langley v. Coughlin*, 715 F. Supp. 522, 557-58 (S.D.N.Y. 1989). Thus, common issues predominate over any individual issues. *See also Marriott, supra* at 173:

> While there are as many as 2,000 class members, there is one central issue of law – whether the change out strip search violates the Fourth Amendment. Piece meal litigation by multiple plaintiffs in multiple law suits would not promoted efficiency and would be inferior to litigation of the issue in one suit.

Accordingly, any *post hoc* argument that reasonable suspicion might have existed for any particular class member is of no import, and should not prevent class certification.

Defendant may also claim that the instant case requires a determination of damages for each individual, and that this predominates over other common issues. That damages may have to be calculated individually does not preclude class certification. As the Second Circuit held in *Visa* Check:

> There are a number of management tools available to a district court to address any individualized damages issues that might arise in a class action, including (1) bifurcating liability and damages trials with the same or different juries; (2) appointing a magistrate judge or special master to preside over individual damages proceedings; (3) decertifying the class after the liability trial and providing notice to class members concerning how they may proceed to prove damages; (4) creating subclasses; or (5) altering or amending the class.

Visa Check, 280 F.3d at 41; *see also Maneely*, 208 F.R.D. at 78 ("it would be improper to let manageability concerns overwhelm the predominance decision. There is a common issue at the core of this case – whether defendants maintained an unconstitutional blanket strip search policy during the class ... I find these common issues represent a sufficient constellation of common issues binding

the class member together.") (quotations omitted).

Given the nature of this action, and in light of the fact that a substantial proportion of the class membership is comprised of economically disenfranchised individuals, a class action is also the superior method by which to adjudicate claims of individual class members. Poor and marginalized class members are unlikely to be able to litigate their cases individually. *Mack,* 191 F.R.D. at 25; *D'Alauro* v. *GC Services Ltd.,* 168 F.R.D. 451, 458 (E.D.N.Y. 1996) (It is appropriate for the court to consider the "inability of the poor or uninformed to enforce their rights and the improbability that large numbers of class members would possess the initiative to litigate individually."); *Tardifff,* 365 F.3d at 7 ("class status here is not only the superior means, but probably the only feasible one ... to establish liability and perhaps damages"). The class action device is designed for the situation where an individual seeks to vindicate "the rights of groups of people who individually would be without effective strength to bring their opponents into court at all." *Amchem Prods.,* 521 U.S. at 617. "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. A class action solves this problem by aggregating the relatively paltry potential recoveries into something worth someone's (usually an attorney's) labor." *Mack,* 191 F.R.D. at 25 (citations omitted).

Here, the prosecution of this litigation as a class action is superior to having thousands of individual cases being filed in this Court, each of which would be repetitious and possibly yield inconsistent adjudications. *See Califano v. Yamaski,* 42 U.S. 682, 700-701 (1979); *see also In re Cigna Corp. Securities Litig*., 2006 U.S. Dist. Lexis 58560, *16-17; *Dodge*, 226 F.R.D. at 183 ("Where a single issue (such as the existence of a uniform policy) is guaranteed to come up time and time again, issues of judicial economy strongly militate in favor of resolving that issue via a

techniques that will bind as many persons as possible."). Assuming *arguendo* that summary judgment is not eventually granted against the County, the trial in this action could last for many weeks, with scores of Jail employees being examined about the practices of Clinton County in an effort to establish municipal liability on behalf of the County. Allowing for a even a small proportion of class members to have duplicative trials on this issue would be an enormous waste of judicial time and resources, and would not be the superior or appropriate way to resolve this controversy. For these reasons, Plaintiff respectfully urges this Court to grant the motion for class certification.

F. Plaintiff Has Also Satisfied the Requirements of Rule 23(b)(2).

Rule 23(b)(2) permits certification when "the party opposing the class has acted or refused to act on grounds generally applicable to the class, thereby making appropriate final injunctive relief or corresponding declaratory relief with respect to the class as a whole." Fed.R.Civ.P. 23(b)(2). A (b)(2) class will be certified where "class wide injunctive or declaratory relief is necessary to redress a group-wide injury," *Robinson v. Metro-North Commuter R.R. Co.* 267 F.3d 147, 162 (2d Cir. 2001), and certification under (b)(3) is appropriate where the class member's entitlement to damages flows directly from the claims for class-wide declaratory or injunctive relief. *Id*., at 165; *see also Marriot*, *supra* at 172. Rule 23(b)(2) is "almost automatically satisfied in actions primarily seeking injunctive relief," *Baby Neal*, 43 F.3d 48, 58 (3rd Cir. 1994). Courts have noted that Rule 23(b)(2) is "an especially appropriate vehicle for civil rights actions seeking... declaratory relief 'for prison and hospital reform.'" *Coley v. Clinton*, 635 F.2d 1364, 1378 (8th Cir. 1980) (*quoting* 3B J. Moore & J. Kennedy, Moore's Federal Practice P 23.40(1) (1980))**.** Where proposed class representatives seek both monetary and injunctive relief, the District Court should allow (b)(2) certification where (1) the positive weight or value to the plaintiffs of the injunctive or declaratory

relief sought is predominant even though compensatory or punitive damages are also claimed, and (2) class treatment would be efficient and manageable, thereby achieving an appreciable measure of judicial economy. *Dodge,* 208 F.R.D. at 90.

Here, the Plaintiff has satisfied the requirements of (b)(2). The questions of whether the Defendants maintained an unconstitutional strip search policy, and the duration of that policy, are clearly issues that are appropriate for class-wide declaratory and/or injunctive relief. Proving the existence of such an unconstitutional policy is in the interest of each and every class member. In addition, class treatment would be efficient and manageable, as the adjudication of these issues could happen once, with the attendant judicial economy. Accordingly, Plaintiffs have satisfied the requirements of a (b)(2) class as well.

G. Clinton County Should Be Required to Assist Class Counsel in Providing Notice to Absent Class Members.

"[I]f a defendant can undertake the tasks associated [with class notice] with less expenses and difficulty than could a plaintiff, the defendant may be ordered to provide notice." *LaFlamme,* 212 F.R.D. at 459. Class counsel is fully prepared and able to provide notice to all class members. The County of Clinton, however, which is in possession of all the addresses and social security numbers for the prospective class members, could assemble them into a readily accessible electronic database for a mass mailing. As such, Plaintiff respectfully suggests that the County should reasonably be required to "provide the notice or ... cooperate with plaintiff by giving him the information necessary to provide the notice." *Id.* at 460.

IV. CONCLUSION

For the foregoing reasons, Plaintiff's Motion for Class Certification should be granted.

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Respectfully submitted by:

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By: _____/s/_____

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