UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF NEW YORK

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ROBERT HILTON and LOUIS VASQUEZ, on behalf of themselves and all others similarly situated,

Plaintiffs,

–against–

Case No. 05 Civ. 1038 (DNH) (DEP)

LESTER N. WRIGHT, M.D., M.P.H., Associate Commissioner/ Chief Medical Officer, for the New York State Department of Correctional Services; and the NEW YORK STATE DEPARTMENT OF CORRECTIONAL SERVICES,

Defendants.

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PLAINTIFFS' MEMORANDUM OF LAW IN SUPPORT OF MOTION FOR CLASS CERTIFICATION

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PRELIMINARY STATEMENT

This brief is submitted in support of plaintiffs Robert Hilton and Louis Vasquez's motion for class certification in this action challenging defendants' creation and application of an unlawful and unconstitutional treatment protocol for prisoners with Hepatitis C, a progressive and potentially fatal liver disease. Plaintiffs, who suffer from Hepatitis C but who have been denied treatment by defendants, seek injunctive relief on behalf of themselves and all other similarly situated prisoners in correctional facilities administered by defendant New York State Department of Correctional Services ("DOCS"). Plaintiffs specifically challenge the Hepatitis C treatment protocol created and implemented by defendant Lester Wright, inasmuch as it has resulted in the categorical denial of treatment for Hepatitis C to numerous prisoners in DOCS custody. Defendants Wright and DOCS have adopted and implemented a policy that is unsupported by medical science, and is only directed at reducing the number of prisoners who are eligible for treatment with the antiviral medications that can successfully treat Hepatitis C. Class certification is appropriate because the policies that plaintiffs challenge in the instant case have been and will be applied to all prisoners dispersed throughout New York State.

STATEMENT OF FACTS

Hepatitis C is a blood-borne virus that if left untreated will lead, in many individuals, to cirrhosis, a scarring of the liver tissue that irreparably impairs functioning, an increased risk of hepatocellular carcinoma, and an increased likelihood of death. (First Amended Complaint ("Compl.") ¶¶ 17–24; Affirmation of Alexander A. Reinert dated September 2, 2005 ("Reinert Aff."), at ¶ 3–4.) Because of Hepatitis C's toxic effect on the liver, it is a leading cause of liver transplantation in the United States. (Compl. ¶ 19.) Provided that Hepatitis C is treated early

enough, damage to the liver can be effectively stopped through antiviral therapy. (Compl. ¶ 21–22; Reinert Aff. ¶ 5.) However, when left untreated the virus will increasingly damage the liver in a substantial number of patients, and in some cases liver function will be so substantially impaired that the only treatment available will be transplantation. (Compl. ¶ 23; Reinert Aff. ¶ 5) Withholding treatment therefore both allows damage to the liver to progress and endangers the success of future antiviral therapy.

Plaintiff Robert Hilton has been diagnosed with chronic Hepatitis C since 1999, and prior to entering the custody of DOCS, he had been approved for treatment with antiviral therapy at Bellevue Hospital. (Compl. ¶¶ 36, 39.) But while in the custody of defendant DOCS and under the care of defendant Wright, Mr. Hilton was until recently provided with no treatment for his Hepatitis C, because of defendant Wright's policy of refusing to provide Hepatitis C treatment to any prisoner who has ever used drugs or alcohol and who has not participated in a prison-run substance abuse treatment program. (Compl. ¶¶ 29, 32–34, 60.)

Plaintiff Louis Vasquez has been in DOCS custody since 1992, and tested positive for Hepatitis C in August 2004, while he was confined at Southport Correctional Facility. (Compl. ¶¶ 81–82.) Although Mr. Vasquez's treating prison physicians have recommended that he receive antiviral therapy, Dr. Wright has denied approval for the therapy because Mr. Vasquez is not currently participating in a prison-run substance abuse counseling program. (Compl. ¶¶ 94, 97, 101.) Notably, Mr. Vasquez participated in a counseling program sanctioned by staff at Elmira Correctional Facility many years ago, and has shown no signs of relapse into drug abuse since that time. (Compl. ¶ 102.) Nonetheless, Mr. Vasquez continues to be denied treatment because of defendant Wright's policy of refusing to provide Hepatitis C treatment to any prisoner who has ever used drugs or alcohol and who is not currently participating in a prison-

run substance abuse counseling program. (Compl. ¶¶ 29, 32–34.)

The substance abuse counseling programs, called ASAT in some facilities and RSAT in those facilities where participants must reside on a particular cell block while taking classes, lasts six months and are often oversubscribed. (Compl. ¶¶ 30, 111-116; Reinert Aff. ¶ 13.) Defendants Wright and DOCS have applied a policy of requiring participation in ASAT or RSAT to all prisoners who wish to receive treatment for Hepatitis C. (Compl. ¶¶ 29, 32–33; Reinert Aff. ¶ 13-14.) Defendants' policy is a blanket one, applying to prisoners who, like Messrs. Hilton and Vasquez, have not used drugs for several years; or who, like Mr. Hilton, have been housed in correctional facilities which either do not offer ASAT/RSAT or do not have sufficient resources to provide ASAT/RSAT to all prisoners who seek to participate in the program; or who, like Mr. Vasquez, have completed prison-sanctioned substance abuse counseling programs in the past. (Compl. ¶ 33; Reinert Aff. ¶ 14.) Defendants Wright and DOCS apply their policy despite the fact that prisoners like plaintiffs have been evaluated for Hepatitis C treatment by DOCS physicians and specialists, and have been approved for such treatment without regard to whether they are participating in a substance abuse treatment program.

Indeed, although DOCS physicians recommended that Mr. Hilton be offered treatment for Hepatitis C since May 2005, Dr. Wright refused to dispense the medication, solely on the ground that Mr. Hilton has not participated in a prison-run substance abuse treatment program. (Compl. ¶¶ 58, 60.) Dr. Wright adopted this position despite the fact that, in both prisons in which Mr. Hilton has been incarcerated, he was not permitted to participate in either RSAT or ASAT. (Compl. ¶¶ 66–67, 74–75.) Thus, even though Mr. Hilton was thwarted in his attempt to comply with the unconstitutional policy created and implemented by defendants DOCS and

Wright, he remained untreated for this serious medical problem.

The same is true for Mr. Vasquez, who has been denied treatment since March 2005 because of his failure to participate in ASAT or RSAT. (Compl. ¶¶ 94–101.) Mr. Vasquez has not used drugs for more than 25 years, and actually completed in a three month drug and alcohol counseling program in 1991. (Compl. ¶¶ 102, 104.) This program was endorsed by the Deputy Superintendent of Programs at Elmira Correctional Facility. (Compl. ¶ 100.) Defendants have no reason to believe that Mr. Vasquez has used drugs or alcohol while in their custody. (Compl. ¶ 102.) Nonetheless, he remains untreated for his potentially fatal condition because of defendants' unconstitutional policy.

The policy which DOCS and Dr. Wright rely on in denying necessary medical care to prisoners like plaintiffs is found in the Hepatitis C Primary Care Practice Guideline. The 2003 version of this guideline provides that prisoner-patients "who have a substance use history must successfully complete or be enrolled in an ASAT program" in order to receive Hepatitis C treatment. (Reinert Aff. ¶ 10 & Ex. 3 at p. 4 n.11.) DOCS and Dr. Wright rely on this guideline to deny treatment to any prisoner who admits to using drugs in the past. By conservative estimates, there are currently over 9,000 prisoners in New York State correctional facilities who have been diagnosed with Hepatitis C. (Compl. ¶ 131; Reinert Aff. ¶ 6.) While not all of these prisoners are medically appropriate candidates for treatment, it is likely that at least 500 of them will develop chronic Hepatitis C which will merit treatment with antiviral therapy. (Reinert Aff. ¶ 8.) All of these prisoners have been or will be subjected to the same policies that resulted in the denial of treatment to Mr. Hilton and Mr. Vasquez.

STATEMENT OF THE CLASS SOUGHT TO BE CERTIFIED

The class sought to be certified comprises plaintiffs and all Hepatitis-C-infected prisoners in DOCS custody who must now or in the future meet defendants' ASAT/RSAT requirement to obtain treatment.

ARGUMENT

I. THE COURT SHOULD GRANT CLASS CERTIFICATION

The court should grant certification for the plaintiff class because the requested injunctive relief applies to all similarly situated persons who are in the custody and care of DOCS, are diagnosed with Hepatitis C, require medical attention, and are not receiving it due to the failure to actively participate in the ASAT or RSAT drug counseling program. Class certification is especially appropriate for prisoners when policies and procedures that affect a large population are being litigated. Marriott v. County of Montgomery, 227 F.R.D. 159 (N.D.N.Y. 2005) (certification appropriate for jail inmates challenging policy of strip searches); Smith v. Armstrong, 968 F. Supp. 50 (D. Conn. 1997) (certification appropriate for inmates challenging policy limiting access to courts); Clarkson v. Coughlin, 145 F.R.D. 339 (S.D.N.Y. 1993) (certification appropriate for deaf and hearing impaired prisoners challenging accommodation policies of Department of Corrections); Doe v. Coughlin, 697 F. Supp. 1234 (N.D.N.Y. 1988) (Certification appropriate for HIV-infected inmates challenging policy segregating them from general population). As one court noted, "[t]he fluid composition of a prison population is particularly well-suited for class status, because, although the identity of the individuals involved may change, the nature of the wrong and the basic parameters of the group remain constant." Dean v. Coughlin, 107 F.R.D. 331, 332 (S.D.N.Y. 1985). In this case,

plaintiffs and all other current and future similarly situated inmates are being or will be denied treatment based on defendants' policies that are applied without regard to factors uniquely relevant to any individual prisoner.

In order for a class to be certified, the prospective class must meet all four elements of Fed. R. Civ. P. 23(a), as well as at least one element of Rule 23(b). See In re Visa Check/MasterMoney Antitrust Litigation, 280 F.3d 124, 132-33 (2d Cir. 2001). Under Fed. R. Civ. P. 23(a),

> [o]ne or more members of a class may sue or be sued as representative parties on behalf of all only if (1) the class is so numerous that joinder of all members is impracticable, (2) there are questions of law or fact common to the class, (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class, and (4) the representative parties will fairly and adequately protect the interests of the class.

As will be demonstrated below, plaintiffs and the proposed class easily meet these requirements. Federal Rule of Civil Procedure 23(b) additionally holds that class actions are maintainable when

> (1) the prosecution of separate actions by or against individual members of the class would create a risk of (A) inconsistent or varying adjudications with respect to individual members of the class which would establish incompatible standards of conduct for the party opposing the class, or (B) adjudications with respect to individual members of the class which would as a practical matter be dispositive of the interests of the other members not parties to the adjudications or substantially impair or impede their ability to protect their interests; or
> (2) 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 . . . .

In determining the propriety of a class certification motion, the Court must accept plaintiffs' allegations as true and refrain from conducting an examination of the merits of the case. Eisen v. Carlisle and Jacquelin, 417 U.S. 156, 177 (1974) (motion for class certification not an occasion to examine merits of the case); accord Baffa v. Donaldson, Lufkin & Jenrette

Securities Corp., 222 F.3d 52, 58 (2d Cir. 2000); Ingles v. City of New York, No. 01 Civ. 8279, 2003 WL 402565, *1 (S.D.N.Y. Feb. 20, 2003); Dodge v. County of Orange, 208 F.R.D. 79, 87 (S.D.N.Y. 2002). Furthermore, the requirements for class certification are liberally construed in the early stages of a case. Woe ex rel. Woe v. Cuomo, 729 F.2d 96, 107 (2d Cir. 1984); Doe v. Karadzic, 192 F.R.D. 133, 136 (S.D.N.Y. 2000); Weigmann v. Glorious Food, Inc., 169 F.R.D. 280, 284 (S.D.N.Y. 1996). In short, when faced with a motion for class certification, "the question [for the Court] is not whether the plaintiff or plaintiffs have stated a cause of action or will prevail on the merits, but rather whether the requirements of Rule 23 are met." In re Visa Check/MasterMoney Antitrust Litigation, 280 F.3d at 133 (internal quotation marks and citation omitted). For the reasons given below, plaintiffs' proposed class meets all the requirements of Rule 23.

A. The Class Is Sufficiently Definite

Although class definition is not a specific requirement of Rule 23, a requirement that a class be identifiable has been implied by courts. Fogarazzao v. Lehman Bros., Inc., No. 03 Civ. 5194, 2005 WL 1802851, *3 (S.D.N.Y. July 29, 2005). A class is sufficiently definite if "it is administratively feasible for the court to determine whether an individual is a member." 7A C. Wright et al., Federal Practice & Procedure § 1760 (2d ed.1986). Membership in the class should be able to be ascertained "without having to answer numerous [individualized] fact-intensive questions." Fogarazzao, 2005 WL 1802851 at *3.

Here, plaintiffs propose a class of all prisoners with Hepatitis C who must now or in the future meet defendants' ASAT/RSAT requirement to obtain treatment. (Compl. ¶ 131; Reinert Aff. ¶ 16.) This definition is remarkably feasible, because defendants themselves have applied

the ASAT/RSAT requirement as an absolute exclusion criteria for prisoners with Hepatitis C who meet designated medical criteria for treatment. (Compl. ¶ 33; Reinert Aff. ¶ 14.) Accordingly, the Court should find that the proposed class is sufficiently definite for the purposes of class certification.

B. The Proposed Class Satisfies the Prerequisites of Rule 23(a)

Rule 23(a) imposes four overlapping requirements for a class: numerosity, commonality, typicality, and adequacy of representation. All of these factors are easily satisfied here.

1. The proposed class is sufficiently numerous

A class must be "so numerous that joinder of all members is impracticable." Fed. R. Civ. P. 23(a)(1). It is not necessary for plaintiffs to "prove the exact number of class members, only that the class is so numerous that the joinder of all potential plaintiffs would be difficult or inconvenient." Dodge, 208 F.R.D. at 88. See also Robidoux v. Celani, 987 F.2d 931, 935 (2d Cir. 1993) (stating that "[a]lthough the party seeking class certification need not present evidence of the 'exact class size or identity of class members' to establish that the proposed class is so numerous that joinder is impracticable, a reasonable estimate thereof is still required."). Moreover, impracticability is not equivalent to impossibility. Robidoux, 987 F.2d at 936. A determination of impracticability depends on all the circumstances surrounding a case, not on mere numbers. Relevant considerations include: (1) judicial economy arising from the avoidance of a multiplicity of actions; (2) geographic dispersion of class members; (3) financial resources of class members; (4) the ability of claimants to institute individual suits; and (5) requests for prospective injunctive relief which would involve future class members. Id. All of

these considerations counsel in favor of finding that plaintiff's proposed class is sufficiently numerous.

First, the class is sufficiently numerous because it consists of at least 500 prisoners in the care and custody of DOCS. (Compl. ¶ 131; Reinert Aff. ¶ 8.) The number of future prisoners who would be included in this class is unknown, but would nonetheless contribute to the overall size of the class. It is well established that classes of more than 100 estimated members generally satisfy the numerosity requirement because they clearly serve interests of judicial economy. Robidoux, 987 F.2d at 936; Matyasovszky v. Housing Authority of City of Bridgeport, 226 F.R.D. 35, 41 (D. Conn. 2005) (class of 100 to 200 members sufficiently numerous); Weigmann, 169 F.R.D. at 284 ("Numbers between 100 and 1,000 generally satisfy the numerosity requirement."); Trief v. Dun & Bradstreet Corp., 144 F.R.D. 193, 198 (S.D.N.Y. 1992) (classes in excess of forty or one hundred members sufficiently numerous). Class actions have been certified in prisoners' rights cases where as few as seven members populated the class. E.g., Clarkson, 145 F.R.D. at 348 (7 member female subclass sufficient because future inmates will be subject to same policy); Meriwether v. Coughlin, 879 F.2d 1037 (2d Cir. 1989) (15 members sufficient).

As plaintiffs' proposed class, by conservative estimates, contains at least 500 members, consolidating the claims into one action serves judicial economy. Indeed, "[e]ven if plaintiff's estimate . . . is substantially overstated to the point that there are only 100 to 200 persons that fit the class definition, such a number would make joinder clearly impracticable." McCoy v. Ithaca Housing Authority, 559 F. Supp. 1351, 1355 (N.D.N.Y. 1983). Further, were plaintiffs to prevail on the merits without class certification, the Court would be limited in its ability to ensure that the judgment would apply to all similarly situated prisoners. As a result, multiple

actions, potentially over five hundred, could ensue. The granting of certification would thus ensure that enforcement of a successful judgment would be readily applicable to all similarly-situated persons, and thus be far more efficient and cost-effective.

Second, the class members are dispersed throughout the state of New York, which would make joinder of all class members impracticable. See Ingles, 2003 WL 402565, at *5 (holding that joinder is impracticable and numerosity satisfied when class members consisted of some twelve detention facilities throughout New York City); Macera v. Chinlund, 91 F.R.D. 579, 583 (W.D.N.Y. 1981) (holding that statewide distribution of a defendant class was sufficient to find that joinder would be impracticable). Class members are situated in correctional facilities throughout New York, and as such, class members would not easily be able to participate in the litigation were class certification to be denied.

Third, the class members are limited financially in their ability to institute individual suits, due to their confinement by DOCS. See Deposit Guar. Nat'l Bank v. Roper, 445 U.S. 326, 339 (1980) ("Where it is not economically feasible to obtain relief within the traditional framework of a multiplicity of small individual suits for damages, aggrieved persons may be without any effective redress unless they may employ the class-action device."). Were DOCS to continue to refuse to treat all similarly situated Hepatitis-C-infected prisoners, the at least 500 similarly situated prisoners would have to institute individual suits or intervene in plaintiffs' lawsuit, an impossible task given the indigency of the vast majority of New York State prisoners. See Matyasovszky, 226 F.R.D. at 40 (noting low income status of proposed class members); see also United States ex rel. Walker v. Mancusi, 338 F. Supp. 311, 315-16 (W.D.N.Y.1971), aff'd, 467 F.2d 51 (2d Cir. 1972) (proposed class of 38 prison inmates considered sufficient to satisfy numerosity requirement).

Finally, plaintiffs' request for prospective injunctive relief would involve future class members, thus making joinder of such future members impracticable. An injunction requiring DOCS to cease imposing the ASAT/RSAT requirement on prisoners who seek Hepatitis C treatment would affect all potential class members, present and future, as the relief would apply not only to Hepatitis-C-infected prisoners with some evidence of past drug use who are currently in the custody of DOCS, but also to similarly situated prisoners who will be in the custody of DOCS and require medical treatment in the future. See Robidoux, 987 F.2d at 936. For all of these reasons, plaintiffs' proposed class satisfies the numerosity requirement.

2. There are questions of law and fact common to the class

To certify a class plaintiffs must also show that "there are questions of law or fact common to the class." Fed. R. Civ. P. 23(a)(2). Commonality is presumed where plaintiffs "seek certification of an injunctive class . . . to right alleged constitutional wrongs." Marisol A. ex rel. v. Giuliani, 929 F. Supp. 662, 690 (S.D.N.Y.1996), aff'd, 126 F.3d 372 (2d Cir.1997); see also Nicholson v. Williams, 205 F.R.D. 92, 98 (E.D.N.Y. 2001). The Second Circuit, for instance, has affirmed that commonality may be satisfied where a named plaintiff shares only one common question of law or fact with the members of the prospective class, despite the presence of differences among the questions raised by individual class members. Marisol A., 126 F.3d at 377; See also Maneely v. City of Newburgh, 208 F.R.D. 69, 75 (S.D.N.Y. 2002) (granting partial class action status, and holding that commonality was satisfied when the common legal issue was whether the defendants implemented a uniform, indiscriminate policy of strip searching all detainees, in the absence of reasonable suspicion).

Here, the named plaintiffs share common questions of both law and fact with the

proposed class. The named plaintiffs challenge the failure of defendants to adequately treat Hepatitis-C for the non-medical reason of failure to participate in the ASAT or RSAT drug treatment programs. The relevant portion of the DOCS Hepatitis C Primary Care Practice Guideline that is being challenged applies equally to all proposed class members. Plaintiffs' claim is therefore identical in both fact and law to the claim of all other members of the proposed class, who have also been or will also be denied Hepatitis-C treatment for the same reason. Cf. Clarkson, supra (certification appropriate for deaf and hearing impaired prisoners challenging accommodation policies of Department of Corrections); Doe v. Coughlin, supra (certifying class challenging segregation of HIV-infected prisoners); Dean, supra (certification appropriate for prisoners challenging dental care in correctional facilities); Todaro v. Ward, 432 F. Supp. 1192 (S.D.N.Y. 1977) (certifying class challenging provision of medical care to prisoners at Bedford Hills Correctional Facility).

3. Plaintiff's claims are typical of the class

Typicality "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." Robinson v. Metro-North Commuter R.R. Co., 267 F.3d 147, 155 (2d Cir. 2001) (internal quotation marks omitted). The typicality criterion "does not require that the factual background of each named plaintiff's claim be identical to that of all class members; rather, it requires that the disputed issue of law or fact occupy essentially the same degree of centrality to the named plaintiff's claim as to that of other members of the proposed class." Caridad v. Metro-North Commuter R.R., 191 F.3d 283, 293 (2d Cir. 1999) (internal quotation marks omitted). When it is alleged that the same unlawful conduct was directed at or affected both the named plaintiff

and the class sought to be represented, the typicality requirement is usually met. Robidoux, 987 F.2d at 936-37.

In the instant case, the typicality requirement is met because plaintiffs' claims arise from the same course of events that endanger all members of the class. Any Hepatitis-C-infected prisoner in the custody of DOCS will be subjected to the ASAT/RSAT requirement prior to obtaining treatment, regardless of whether the prisoner has used or abused drugs in the recent past, regardless of whether the prisoner ever has participated in a substance abuse treatment program, regardless of the availability ASAT and RSAT in the facility where the prisoner is incarcerated, and regardless of the recommendations of the prisoner's treating and specialist physicians. Indeed, by applying the same ASAT/RSAT requirement to so many different prisoners, defendants have themselves guaranteed that plaintiff's claims are typical of the class's claims. See e.g., Morgan v. Koenigsmann, 03 Civ. 3987, slip op. (KMW)(AJP) (S.D.N.Y. 2004) (application of ASAT requirement to prisoner who had been drug and alcohol free for more than a decade and who had completed Narcotics Anonymous and Alcoholics Anonymous programs); Conti v. Goord, 59 Fed. Appx. 434 (2d Cir. 2003) (same); Domenech v. Goord, 797 N.Y.S.2d 313, 314 (2d Dept. 2005), affirming 766 N.Y.S.2d 287 (Sup. Ct. 2003) (application of ASAT requirement to prisoner who had been drug free for more than 30 years); McKenna v. Wright, 386 F.3d 432, 434 (2d Cir. 2004) (application of ASAT requirement to prison who previously had been deemed ineligible for ASAT due to medical condition); see also Reinert Aff. ¶ 14.

Thus, any prisoner with an admitted past history of drug use will be subjected to the same unconstitutional and illegal policy as plaintiffs. Plaintiffs' claims that this policy violates the Eighth Amendment, the Americans with Disabilities Act, and Section 504 of the Rehabilitation Act arise out of the promulgation and enforcement of the relevant section of the DOCS Hepatitis

C Primary Care Practice Guideline, and thus the legal grievance of each class member will arise from one single course of action taken by the defendant.

4. Plaintiffs can adequately represent the proposed class

The adequacy of representation requirement compels an inquiry "as to whether: 1) plaintiff's interests are antagonistic to the interest of other members of the class and 2) plaintiff's attorneys are qualified, experienced and able to conduct the litigation." Baffa, 222 F.3d at 60. To meet the first requirement, a class representative "must be part of the class and possess the same interest and suffer the same injury as the class members." Amchem Products, Inc. v. Windsor, 521 U.S. 591, 625–26 (1997) (internal quotation marks omitted).

Plaintiffs easily satisfy that requirement here. Like the proposed class, plaintiffs are in the custody of DOCS, have Hepatitis C, require treatment for this disease, and have been denied treatment because of the ASAT/RSAT policy challenged here. Like the proposed class, plaintiffs will and have suffered injuries by defendants' failure to provide Hepatitis C treatment. There is no conflict of interest between the named plaintiffs and the proposed class, because plaintiffs' desire to void the ASAT/RSAT requirement is entirely consistent and complimentary to the interest of all other class members in achieving the same. Moreover, plaintiffs' claims rest on the same theory of liability as do the claims of the proposed class. The injunctive relief sought by plaintiffs – the voiding of defendants' ASAT/RSAT requirement – will benefit all Hepatitis-C-infected prisoners who seek treatment for their disease.[1]

That Mr. Hilton is currently receiving treatment for his Hepatitis C despite his inability to

[1] The fact that plaintiffs seek damages for themselves, which might be measured differently from individual to individual, and injunctive relief on behalf of the class, is no barrier to certification. Ingles, 2003 WL 402565, at *6.

comply with defendants' ASAT/RSAT requirement does not affect his suitability as a named plaintiff for the class. First, Mr. Hilton retains an interest in enjoining the application of the policy in the event that he requires retreatment for his Hepatitis C. (Reinert Aff. ¶ 14(i).) Thus, Mr. Hilton's claim for injunctive relief is not mooted by the fact that he currently is being offered treatment, at defendants' discretion, for Hepatitis C. Second, Mr. Hilton retains an interest in obtaining declaratory relief establishing the unconstitutionality of defendants' policy, relief which is separate from his request for injunctive relief ordering defendants to provide Hepatitis C treatment. Ford v. Reynolds, 316 F.3d 351, 356 n.3 (2d Cir. 2003) (finding claims for injunctive relief moot but remanding for decision on claims for declaratory relief). Finally, even if Mr. Hilton's injunctive relief claim is considered moot prior to a ruling on class certification, he remains an appropriate named plaintiff under well-established exceptions to the mootness doctrine for class actions. See County of Riverside v. McLaughlin, 500 U.S. 44, 51–52 (1991).[2]

The second requirement, that the plaintiffs' attorney be competent to handle the case, is met when the attorney is qualified, experienced, and generally able to conduct the proposed litigation. Eisen, 391 F.2d at 562. In the instant case, plaintiff's counsel is free from conflicts of interest, is qualified, experienced, and able to conduct the litigation. Plaintiff's counsel has litigated numerous successful cases concerning the Eighth Amendment rights of prisoners, and has a specific expertise in healthcare matters. (Reinert Aff. ¶¶ 26-27.) In addition, plaintiff's counsel is one of the few private counsel in New York State that has experience challenging the

[2]Pursuant to this Court's Local Civil Rule 7.1(b)(2), plaintiffs' motion for class certification could not have been filed without first consulting with counsel for defendants and the Court. As a practical matter, therefore, plaintiffs could not have brought their class certification prior to defendants' unilateral decision to provide treatment to Mr. Hilton.

ASAT/RSAT requirement as it applies to Hepatitis C-infected prisoners. (Reinert Aff. ¶ 27.) Counsel also has sufficient time and resources to devote to this case. (Reinert Aff. ¶ 28.)

C. The Class Action is Maintainable Under Fed. R. Civ. P. 23(b)

In addition to satisfying all of the requirements of Rule 23(a), a party seeking class certification must also meet one of the requirements of Rule 23(b). In the instant case, plaintiffs can satisfy at least three of the possible requirements imposed by Rule 23(b).

1. The proposed class action is maintainable under Rule 23(b)(2)

A class action is maintainable under Rule 23(b)(2) if "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." This rule "was intended to assist litigants seeking widespread institutional reform through injunctive and/or declaratory relief." Ingles, 2003 WL 402565, at *8. "[S]everal courts have found that Rule 23(b)(2) will generally be satisfied in cases where injunctive relief is sought and would benefit the entire class." Id.

Here, class certification is maintainable under subdivision (b)(2) because plaintiffs challenge the practices and policies employed by defendants in treating prisoners infected with Hepatitis C, and therefore seek injunctive and declaratory relief that would benefit the class as a whole. Marriott, 227 F.R.D. at 172-173 (even where monetary damages are sought, class certification was appropriate under 23(b)(2) because strip search policy being challenged was applicable to all members of class.) The relevant DOCS Hepatitis C Primary Care Practice Guideline applies to all prisoners generally, not merely to the named plaintiffs in this action.

Thus plaintiffs are seeking the precise "widespread institutional reform" that is central to Rule 23(b)(2)'s purpose. Ingles, 2003 WL 402565, at *8. Furthermore, because the injunctive and declaratory relief would simply mandate that defendants adequately treat Hepatitis-C-infected prisoners, the management of such relief would not be complicated and judicial economy would be served.

2. The proposed class action is maintainable under Rule 23(b)(1)(B)

In the alternative, the class action is maintainable under Fed. R. Civ. P. 23(b)(1)(B), which permits class actions where "adjudications with respect to individual members of the class . . . would as a practical matter be dispositive of the interests of the other members not parties to the adjudications or substantially impair or impede their ability to protect their interest." Were the court to grant injunctive and declaratory relief to plaintiffs, the rights of all other similarly situated potential plaintiffs would be profoundly affected because a rule that applied to all prospective class members would have been struck down by the court as a violation of the Eighth Amendment, the ADA, or the Rehabilitation Act. Conversely, were the court to deny plaintiffs' claim, the right of all other prospective plaintiffs to make similar claims would be severely curtailed. Cf. Ingles, 2003 WL 402565, at *7.

Further, the court in Ingles expressly rejected the contention that Rule 23(b)(1)(B) existed only to protect defendants or that it applied in only "limited fund" cases (those cases where a specific pool of money would be depleted by an individual verdict, thereby affecting the possible amount future plaintiffs could receive). Id. at *8. The Ingles court specifically found that certification under this subsection could be granted to classes of inmates seeking injunctive relief. Id.; see also, e.g., Caroline C. by and through Carter v. Johnson, 174 F.R.D. 452, 467 (D.

Neb. 1996); Coleman v. Wilson, 912 F. Supp. 1282, 1293 (E.D. Cal. 1995); Gesicki v. Oswald, 336 F. Supp. 371, 374 (S.D.N.Y. 1971).

Here, plaintiffs seek to represent a class of inmates seeking injunctive and declaratory relief. The injunctive and declaratory relief they seek would apply equally with respect to all individual Hepatitis-C-infected prisoners who have been subjected to defendants' ASAT/RSAT policy, and would be dispositive of the interests of the other members who are not yet a party to this litigation. Therefore, maintenance under Fed. R. Civ. P. 23(b)(1)(B) is appropriate.

3. The proposed class action is maintainable under Rule 23(b)(1)(A)

Rule 23(b)(1)(A) authorizes a class action if "the prosecution of separate actions by . . . individual members of the class would create a risk of . . . inconsistent or varying adjudications with respect to individual members of the class." Fed. R. Civ. P. 23(b)(1)(A). It cannot be disputed that, should individual members of the class pursue individual actions seeking injunctive and declaratory relief, there is a risk of "inconsistent or varying adjudications with respect to individual members of the class." Id. Although some defendants have argued that Rule 23(b)(1)(A) is intended to protect defendants' interests in avoiding inconsistent adjudications, the Court has an independent interest in avoiding inconsistent adjudications of the same controversy. Herbert B. Newberg & Alba Conte, 1 Newberg on Class Actions § 4.07 (3d ed.1992).

Here, consistency of the adjudication of the proposed class's claims is especially important, because it involves the application of a system-wide policy related to medical treatment. Accordingly, certification under Rule 23(b)(1)(A) is also proper. See Ingles, 2003 WL 402565, at * 7 (certifying class action under Rule 23(b)(1)(A) for jail detainees seeking

injunctive relief).

D. Plaintiff's Counsel Should Be Appointed Class Counsel Pursuant to Rule 23(g)(2)(b)

Since plaintiffs' counsel has no conflict of interest and can adequately represent all class members, has already devoted significant resources to identifying and investigating the legal claim, has experience in handling class actions and other complex litigation, is knowledgeable about the applicable law, and is willing and able to devote the necessary resources to the litigation, and is the only applicant for class counsel, it is respectfully requested that plaintiffs' counsel be appointed class counsel pursuant to Fed. R. Civ. P. 23(g)(2)(b).

CONCLUSION

In conclusion, plaintiffs respectfully requests that the Court, as soon as is practicable, grant plaintiffs' request that a class be certified with respect to plaintiffs' claims for injunctive and declaratory relief.

Dated: New York, New York
September 2, 2005

Respectfully submitted,

KOOB & MAGOOLAGHAN

/s/ Alexander A. Reinert
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UNPUBLISHED AUTHORITY

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK
----------X
JOHN MORGAN,

Plaintiff,

-against-

03-CIV-3987(KMW)(AJP)
ORDER

CARL J. KOENIGSMANN, M.D., Medical Director Green Haven C.F., and LESTER N. WRIGHT, M.D., Associate Commissioner Chief Medical Officer.

Defendants.
----------X

WOOD, U.S.D.J.:

Plaintiff John Morgan, pro se, sues defendants pursuant to 42 U.S.C. § 1983. Plaintiff alleges that defendants Carl J. Koenigsmann, M.D. ("Koenigsmann") and Lester N. Wright, M.D. ("Wright") have been deliberately indifferent to plaintiff's serious medical needs, in violation of his constitutional rights under the Eighth Amendment to the United States Constitution. Plaintiff seeks a declaratory judgment, an injunction ordering defendants to immediately treat plaintiff's hepatitis C,[1] and compensatory and punitive damages in the amount of $10 million. Defendants moved for summary judgment, arguing (1) that defendants lack the personal involvement required to be liable, (2) that plaintiff cannot prove that defendants acted with deliberate indifference toward him, and (3) that defendants are entitled to

[1] Plaintiff's complaint seeks "declaratory relief in the form of immediate treatment for his condition." (Complaint, 6). The Court construes pro se plaintiff's complaint liberally, see Branham v. Meachum, 77 F.3d 626, 628-29 (2d Cir. 1996), and treats this as a request for both declaratory and injunctive relief.

qualified immunity. For the reasons stated below, defendants' motion is granted with respect to defendant Koenigsmann and denied with respect to defendant Wright.

I. Factual Background

Unless otherwise noted, the following facts are undisputed, and are derived from the parties' Rule 56.1 statements, affidavits, and other submissions.[2]

A. The Parties

Plaintiff is an inmate in the custody of the New York State Department of Correctional Services ("DOCS"), and is currently incarcerated in Green Haven Correctional Facility ("Green Haven"). Prior to his transfer to Green Haven in September 1996, plaintiff had been incarcerated in Attica Correctional Facility ("Attica") since, at least, 1992. (Defs' 56.1 Stmt., ¶ 1; Plaintiff's Statement Pursuant to United States District Court Rules Southern and Eastern District of New York, Civil Rule 56.1. ("Plnt's 56.1 Stmt."), dated Apr. 9, 2004, ¶ 1). Plaintiff was diagnosed with the Hepatitis C virus ("HCV") in 1992, and alleges that defendants have denied him treatment for that illness over the past five years on the ground that plaintiff has not enrolled in DOCS' Alcohol and

[2] The Court requested and received from defense counsel in August 2004 unexcerpted copies of all DOCS Hepatitis C Primary Care Practice Guidelines, as well as several medical reports referred to in Defendants' Statement Pursuant to Local Civil Rule 56.1 ("Defs' 56.1 Stmt."), dated Jan. 30, 2004, ¶ 18. The Court has placed a copy of these documents in the court file. When possible, the Court will refer to the documents by reference to their Bates stamp numbers.

Substance Abuse Treatment ("ASAT") program.[3] Plaintiff argues that there is no basis for conditioning his treatment for HCV on his enrollment in an ASAT program. Plaintiff admits that he used drugs and alcohol prior to his incarceration, but claims that he has been free of both drugs and alcohol for the past thirteen years. (Plnt's 56.1 Stmt. ¶ 2).[4]

Defendant Koenigsmann is a medical doctor, licensed to practice medicine in the State of New York. (Declaration of Carl Koenigsmann ("Koenigsmann Decl."), dated Jan. 29, 2004, ¶ 2). From March 1999 until April 17, 2003, Koenigsmann served as Facility Health Services Director ("FHSD") at Green Haven. In that capacity, Koenigsmann "reviewed the care rendered by Green Haven

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[3] The term "ASAT" is used interchangeably with the term "RSAT", which refers to DOCS' Residential Substance Abuse Treatment program. The Court will refer to both programs using the term "ASAT."

[4] Defendants argue that plaintiff should not be taken "at his word," and suggest that plaintiff's claim to be drug- and alcohol-free is "absurd[]" in light of his "steadfast refusal to participate in the drug treatment programs made available by DOCS." (Reply Memorandum of Law in Further Support of Defendants' Motion for Summary Judgment ("Defs' Reply Memo"), dated May 24, 2004, at 2). Plaintiff does not ask to be taken "at his word." Plaintiff has provided (1) a Certificate of Participation, indicating that he successfully completed a twelve-step Alcoholics Anonymous program in October 1992, and (2) a Certificate of Completion, indicating that he successfully completed a twelve-step Narcotics Anonymous program in March 2000. (Plnt's 56.1 Stmt. Exh. 10). Plaintiff has also submitted evidence that in September 2003, he was ordered to submit to a urinalysis test for marijuana by C.O. Haywood, following Haywood's claim that "Inmate Morgan's eyes appeared glossy, and Inmate was emanating an odor of marijuana." (Id., at Exh. 1). Plaintiff's urinalysis test came back negative. (Id.). Finally, plaintiff has submitted disciplinary records from his period of incarceration at both Green Haven and Attica, which indicate that there is no record that plaintiff has ever been disciplined for alcohol or drug use. (Id., at Exh. 2). Defendants have presented no evidence to the contrary. In fact, the record indicates that the only reason defendants know that plaintiff used drugs and alcohol prior to his incarceration is that plaintiff freely admitted it when his medical history was being prepared, (see Medical History, Declaration of Donald Nowve ("Nowve Decl."), dated Jan. 29, 2004, Exh. B), and he has continued to admit it in this case, (see Defs' 56.1 Stmt., ¶ 2; Plnt's 56.1 Stmt., ¶ 2).

primary care providers and also reviewed and approved all requests by Green Haven primary care providers for specialty care services by outside medical providers, including surgeons, medical specialists, physical therapists, procedures and diagnostic studies." (Id. at ¶ 4).

Defendant Wright is also a medical doctor. Wright has held the position of Deputy Commissioner and Chief Medical Officer of the DOCS throughout plaintiff's incarceration at Green Haven. Wright's primary responsibility at DOCS is "to set the overall direction for [DOCS'] provision of health care." Brock v. Wright, 315 F.3d 158, 165 (2d Cir. 2003) (unrelated case).

B. Plaintiff's Illness

In 1992, while incarcerated in Attica, plaintiff was diagnosed with HCV, a chronic liver disease that can result in inflammation, scarring, and ultimately cirrhosis of the liver.[5] (Defs' 56.1 Stmt. ¶ 11; Plnt's 56.1 Stmt. ¶ 5). On or about December 3, 1999, plaintiff underwent a liver biopsy to gauge the severity of his illness. (Defs' 56.1 Stmt. ¶ 13; Plnt's 56.1 Stmt. ¶ 7). The liver biopsy revealed that plaintiff had developed fibrosis, and

[5] Defendants appear to assume that how plaintiff became infected is relevant (defendants state that plaintiff contracted the virus, and developed liver fibrosis, "due to plaintiff's history of substance abuse." (Defs' 56.1 Stmt. ¶ 14)). Their contention not only is irrelevant, but also is without evidentiary basis. Defendants provide no support for this claim; defendants presumably base their assumption on the fact that plaintiff admits that in the past he engaged in intravenous drug use, and intravenous drug use is a primary route of infection for HCV. Plaintiff denies that he contracted HCV as a result of his drug use, because he claims that although he did use heroin intravenously for a period of two weeks in 1983, he used "sterile syringes and did not share his needle with anyone else and did not use the same needle twice." (Affidavit of John Morgan ("Morgan Aff."), dated Apr. 12, 2004, ¶ 3). Whatever the cause, the issue of treatment is a separate matter altogether.

chronic hepatitis, grade 2, stage 2. (St. Agnes Hospital Surgical Pathology Report, Bates stamp number SA8, Nowve Decl., Exh. B).

C. DOCS Hepatitis C Primary Care Practice Guidelines[6]

On March 31, 1999, DOCS Division of Health Services released a practice guideline regarding the screening of inmates for HCV, and the treatment of inmates diagnosed with HCV. (Defs' 56.1 Stmt. ¶ 16; Hepatitis C Primary Care Practice Guideline, dated Mar. 31, 1999 ("March 1999 Guideline"), Nowve Decl., Exh. D). The March 1999 Guideline was developed by a committee consisting of medical doctors and nurses, and purported to be consistent with "community standards of care." (Id. at 1). It also recognized "the need for periodic reviews and revisions . . . to insure that this Guideline remains current." (Id.) The March 1999 Guideline provided that treatment for Hepatitis C "should be considered in accordance with the following criteria." (Id. at 2). These criteria included, inter alia:

> 10. No evidence of active substance abuse (drugs and/or alcohol) during the past 2 years (check urine toxicology screen if drug use is suspected).
>
> 11. Successful completion of an ASAT program (the inmate may be enrolled concurrently with hepatitis C treatment if time does not allow for prior completion of the program).

(Id. at 3)

The March 1999 Guideline was revised on December 17, 1999. (Defs' 56.1 Stmt. ¶ 16; Hepatitis C Primary Care Practice

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[6] The Court will refer to the numerous versions of the Practice Guideline collectively as the "Practice Guidelines." However, the Court will refer to each version of the Guideline by month and year when it is necessary to reference the language contained in a particular version of the Guideline.

Guideline, dated Dec. 17, 1999 ("December 1999 Guideline"), Nowve Decl., Exh. D). The only revision relevant to plaintiff's claim is the revision of the tenth criterion. Instead of requiring "no evidence of active substance abuse . . . during the past 2 years", (March 1999 Guideline, 3) (emphasis added), the December 1999 Guideline required "no evidence of active substance abuse . . . during the past 6 months . . . ." (December 1999 Guideline, 3) (emphasis added).

The December 1999 Guideline was in turn revised on December 13, 2000, when the tenth and eleventh criteria were merged into a single paragraph. (Defs' 56.1 Stmt. ¶ 16; Hepatitis C Primary Care Practice Guideline, dated Dec. 13, 2000 ("December 2000 Guideline"), Nowve Decl., Exh. D).

> 10. No evidence of active substance abuse (drug and/or alcohol) during the past 6 months (check urine toxicology screen if drug use is suspected). Those who have a substance use history must successfully complete or be enrolled in an ASAT program.

(December 2000 Guideline, 3)

The Practice Guideline was most recently updated on March 10, 2003. (Defs' 56.1 Stmt. ¶ 16; Hepatitis C Primary Care Practice Guideline, dated Mar. 10, 2003 ("March 2003 Guideline"), Nowve Decl., Exh. D). No changes have been made to the ASAT requirement since December 2000.

D. Plaintiff's Refusal to Participate in an ASAT Program, and his Subsequent Denial of Treatment

Plaintiff claims that he was first offered treatment for his hepatitis C in 1997, but that his attending physician at Green

Haven advised him to refuse the treatment in anticipation of a new, less intrusive treatment with fewer side effects. (Plnt's 56.1 Stmt., ¶ 15).

The full factual picture pertaining to plaintiff's subsequent and continuing efforts to obtain treatment for his condition is difficult to discern from the record.[7] All parties agree that following plaintiff's liver biopsy in 1999, plaintiff's treating physicians requested that plaintiff (1) receive drug therapy for his illness, (2) be referred to a liver specialist, and (3) receive an updated liver biopsy to track the progression of his illness.

Each of these requests was ultimately denied by defendant Koenigsmann, who cited plaintiff's refusal to participate in an ASAT program as the reason for the denial.[8] Koenigsmann's position was that because plaintiff used drugs and alcohol in the past, he was required by the Practice Guidelines to participate in an ASAT program as a pre-condition to being treated for hepatitis C, which treatment would presumably include drug therapy, a referral to a

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[7] Defendants' papers do not make any attempt to chronicle these efforts. Plaintiff has attempted to collect records of these incidents to document the number of times Dr. Koenigsmann denied plaintiff's, and plaintiff's treating physicians', requests for treatment and referral to a specialist. (See generally Plnt's 56.1 Stmt., Exh. 3). Plaintiff has also attempted to collect records of his grievances pertaining to these incidents. (See generally id. at Exh. 9).

[8] For instance, Koenigsmann denied the request by plaintiff's treating physician that plaintiff received an "updated liver biopsy to assess [the] progression of chronic HCV" because treatment was "out of the question" unless plaintiff agreed to participate in an ASAT program. (Koenigsmann Denial, Bates stamp number GHM 75, dated May 23, 2003, Plnt's 56.1 Stmt. Exh. 3).

liver specialist, and an updated liver biopsy.[9]

On August 27, 2002, plaintiff wrote to defendant Wright, complaining about Dr. Koenigsmann's denial of his requests for treatment. (See Letter to Dr. Wright, dated Aug. 27, 2002, Plnt's 56.1 Stmt. Exh. 4). On September 30, 2002, Marc F. Stern, Regional Medical Director, responded to plaintiff's letter, on behalf of Dr. Wright. (See Letter to Mr. Morgan, dated Sept. 30, 2002, Plnt's 56.1 Stmt. Exh. 5). Stern's letter stated that the reason plaintiff was being denied treatment was that he had not yet participated in a drug abuse prevention program, and that participation is "required by our Guidelines and is non-negotiable." (Id.). Stern's letter also stated that "[i]f you are seriously interested in beginning treatment for your Hepatitis C infection, I would strongly encourage you to agree to participate in the drug treatment program. It is a worthwhile program, but at the very least, it should not be harmful." (Id.).

In this lawsuit, plaintiff has offered no reason to refuse to

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[9] Because the record does not clearly indicate when plaintiff and his treating physicians made each of their requests, it is unclear which version of the Practice Guidelines was in place each time Koenigsmann denied the requests due to plaintiff's failure to enroll in an ASAT program. Defendants gloss over this fact, stating that "all of the Guidelines uniformly providee [sic], in essence, that in order for an inmate to be eligible for antiviral drug therapy for Hepatitis C, there must be no evidence of active substance abuse (drug and/or alcohol) for a specified period of time. Those who have a history of substance abuse must 'successfully complete or be enrolled in [ASAT]' as a co-requisite for antiviral treatment." (Defs' 56.1 Stmt. ¶ 19). In fact, until the December 2000 Guideline, the Practice Guidelines did not specify who must participate in an ASAT program as a prerequisite for treatment. It was not until the December 2000 Guideline that persons with a "substance use history" were specifically required to participate in an ASAT program. The Practice Guidelines do not define the term "substance use history."

participate in an ASAT program.[10] In 2002 or 2003, plaintiff appears to have placed his name on the waiting list for an ASAT program, but he subsequently withdrew his name from the list. The record contains an undated, handwritten letter from plaintiff asking that his name be withdrawn from the waiting list.[11] (Plaintiff's Withdrawal Letter, Bates stamp number D0091, undated, Nowve Decl., Exh. C). In that letter, plaintiff states that he expects the requirement to be eliminated "in the near future":

> [I] received a letter from the law firm of White & Case requesting permission to obtain my medical records from the medical department at Green Haven. I gave them my permission to access the records. They are for the purpose of assisting White & Case in their class action law suit against all medical Departments in D.O.C.S. The purpose of this law suit is to remove all medical department policies that require patients infected with cronic [sic] Hepatitis-C to participate in A.R.S.A.T. or any other voluntary drug rehabilitation program in order to receive medical treatment for this deadly disease.
>
> It is my belief that in the near future I will not be required to be enrolled in the A.R.S.A.T. program in order to receive medical treatment for my cronic [sic] Hepatitis-C infection! That is my motivation for withdrawing my application to participate in A.R.S.A.T.

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[10] One reason an inmate might not want to enroll in an ASAT program, particularly if that inmate has successfully completed other rehabilitation programs, is that participating in an ASAT program can be very time-consuming. See Domenech v. Goord, 196 Misc. 2d 522, 524 n.1, 766 N.Y.S.2d 287 (N.Y. Sup. Ct. May 28, 2003) ("ASAT is a six-month rehabilitation program for substance abusers which apparently requires full-day attendance. This time commitment would evidently interfere with petitioner's full schedule of attending school during the day and working as a porter at night.")

[11] It is unclear from the record when plaintiff signed up for, and withdrew his name from, the ASAT waiting list. In plaintiff's deposition, he acknowledged that he refused "ASAT participation" in 2002. (Defs' 56.1 Stmt., ¶ 26). However, the record contains a letter to plaintiff from E. Mamane, dated May 9, 2003, acknowledging receipt of plaintiff's request to withdraw his application for the ASAT program. (Mamane's Acknowledgment Letter, Bates stamp number D0092, May 9, 2003, Nowve Decl., Exh. C).

Id. (emphasis in original)

II. Discussion

A. Summary Judgment Standard

To prevail on a motion for summary judgment, the moving party must demonstrate that there are no genuine issues of material fact to be tried, and that it is entitled to judgment as a matter of law. See Fed. R. Civ. Pro. 56(c); Celotex Corp. v. Catrett, 477 U.S. 317, 322 (1986); Citizens' Bank v. Hunt, 927 F.2d 707, 710 (2d Cir. 1991). The moving party "bears the initial responsibility of informing the district court of the basis for its motion"; that responsibility includes identifying the materials in the record that the moving party believes demonstrate the absence of a genuine issue of material fact. Celotex Corp., 477 U.S. at 323. Once a motion for summary judgment is made and supported, the non-moving party must set forth specific facts to be tried. See Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248 (1986). An issue is genuine if "the evidence is such that a reasonable jury could return a verdict for the nonmoving party." Id.; Mitchell v. Shane, 350 F.3d 39, 47 (2d Cir. 2003).

B. Section 1983 and Personal Involvement

In order for a plaintiff to obtain damages against a defendant in a Section 1983 action, the plaintiff must prove that that defendant was personally involved in the constitutional deprivation. See Colon v. Coughlin, 58 F.3d 865, 873 (2d Cir. 1995). Defendants argue that because they did not personally

render treatment to plaintiff, plaintiff cannot prove that they were personally involved in the alleged, constitutional deprivation.

Defendants' argument misses the point. Plaintiff does not contend that his treating physicians denied him a constitutional right; instead, he contends that defendants, who were supervisory officials, denied him that right. A supervisory official may be shown to have sufficient personal involvement if:

> (1) the defendant participated directly in the alleged constitutional violation, (2) the defendant, after being informed of the violation through a report or appeal, failed to remedy the wrong, (3) the defendant created a policy or custom under which unconstitutional practices occurred, or allowed the continuance of such a policy or custom, (4) the defendant was grossly negligent in supervising subordinates who committed the wrongful acts, or (5) the defendant exhibited deliberate indifference to the rights of inmates by failing to act on information indicating that unconstitutional acts were occurring.

Id. (citing Wright v. Smith, 21 F.3d 496, 501 (2d Cir. 1994)

Defendant Koenigsmann was the FSHD at Green Haven. In this capacity, Koenigsmann reviewed the care rendered to inmates, and he either approved or denied requests for specialty care services, procedures, and diagnostic studies. (Koenigsmann Decl., ¶ 4). Plaintiff has produced evidence that Koenigsmann, who is himself a medical doctor, repeatedly denied requests by plaintiff's primary care physicians that plaintiff receive drug therapy, a referral to a liver specialist, and an additional biopsy for diagnostic purposes. (See generally Plnt's 56.1 Stmt., Exh. 3). Koenigsmann's personal involvement does not, therefore, rest

impermissibly on a theory of respondeat superior. See Hernandez v. Keane, 341 F.3d 137, 144 (2d Cir. 2003). Rather, plaintiff has offered evidence that Koenigsmann participated directly in the alleged constitutional violation, by deciding to withhold treatment from plaintiff.

Defendant Wright is the Deputy Commissioner and Chief Medical Officer of the DOCS. Plaintiff has offered evidence that Dr. Wright promulgated to health personnel within the DOCS system the Practice Guidelines that are central to this suit. (See Memorandum from Lester N. Wright, M.D., MPH, to Facility Health Services Directors, dated Mar. 25, 2003, Koenigsmann Decl., Exh. 1).[12] There is no dispute that treatment is being withheld from plaintiff as a result of the Guidelines that Dr. Wright promulgated; thus, to the extent that unconstitutional acts have occurred as a result of applying the Guidelines, a reasonable jury could conclude that Wright was personally involved in that deprivation, because he "created a policy or custom under which unconstitutional practices occurred, or allowed the continuance of such a policy or custom." Colon, 58 F.3d at 873. Cf. Brock, 315 F.3d at 165-66 (holding that a jury could conclude that Wright was personally involved in an alleged deprivation due to Wright's promulgation of the DOCS policy

[12] The documents produced by defense counsel pursuant to the Court's request contain additional evidence that Dr. Wright promulgated and oversaw the implementation of the Guidelines. (See Memorandum from Lester N. Wright, M.D., MPH, Associate Commissioner/Chief Medical Officer, to Facility Health Services Directors, dated Apr. 12, 1999, Bates stamp numbers D0054-56; Memorandum from Lester N. Wright, M.D., MPH, Associate Commissioner/Chief Medical Officer, to Facility Health Services Directors, Nurse Administrators, Pharmacists, dated Sept. 27, 1999, Bates stamp numbers D0040-44).

at issue in that case).[13]

C. Eighth Amendment[14]

Plaintiff claims that defendants violated plaintiff's rights under the Eighth Amendment when they participated in the decision to withhold HCV treatment from him because he refuses to enroll in

[13] Defendants cite Judge Buchwald's decision in Graham v. Wright as support for the proposition that Wright lacks the requisite personal involvement to be held liable. See Graham v. Wright, No. 01 Civ. 9613(NRB), 2003 WL 22126764, *2 (Sept. 12, 2003). In Graham, Judge Buchwald held that Wright lacked the personal involvement required to be held liable for money damages. Although Judge Buchwald took note of the fact that plaintiff there failed to allege that Wright personally treated him, her holding was based on the fact that plaintiff there actually lacked standing to challenge the Hepatitis C Practice Guidelines. The reason for this was that plaintiff there actually had completed an ASAT program, and was fully eligible to receive treatment for his HCV according to the Practice Guidelines. That case is thus distinguishable from the instant case.

[14] The Eighth Amendment states: "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted." U.S. Const. Amend. VIII. The Eighth Amendment was made applicable to the States through the Fourteenth Amendment. See Estelle v. Gamble, 429 U.S. 97, 101-02 (1976) (citing Robinson v. California, 370 U.S. 660 (1962)).

an ASAT program.[15, 16] "To establish an Eighth Amendment claim arising out of inadequate medical care, a prisoner must prove 'deliberate indifference to [his] serious medical needs.'" Chance v. Armstrong, 143 F.3d 698, 702 (2d Cir. 1998) (quoting Estelle, 429 U.S. at 104). This requires that the prisoner prove both that

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[15] Other courts in this Circuit have considered similar claims by inmates infected with HCV. Many of those claims are distinguishable on their facts from the instant case. See, e.g., Johnson v. Wright, No. 01 Civ. 2122(GWG), 2004 WL 938299 (S.D.N.Y. May 3, 2004) (plaintiff there initially received one form of treatment for his HCV, but was denied a newer form of treatment by Wright pursuant to the March 1999 Guideline because plaintiff there actually tested positive for marijuana within the two-year period prior to his treating physician's request that he begin the new treatment. In addition, approximately two years after the plaintiff there tested positive for marijuana, Wright approved the plaintiff for the newer treatment -- there is no mention in Magistrate Judge Gorenstein's opinion that the plaintiff there ever enrolled in an ASAT program); Pabon v. Wright, No. 99 Civ. 2196(WHP), 2004 WL 628784 (S.D.N.Y. Mar. 29, 2004) (plaintiff there received treatment for his HCV, but complained (1) that he had not been informed about the drug's risks and side effects, and (2) that his treatment had been delayed because defendants required that he undergo a medically advised liver biopsy prior to receiving treatment); McKenna v. Wright, No. 01 Civ. 6571(HB), 2004 WL 102752 (S.D.N.Y. Jan. 21, 2004) (remaining defendants denied qualified immunity on a motion to dismiss); Graham, 2003 WL 22126764 (plaintiff there successfully completed ASAT program, and appeared to be otherwise eligible to receive treatment).

[16] The one case with facts most similar to the instance case is Conti v. Goord, an unpublished summary decision in which the Second Circuit noted that the prisoner there might be able to demonstrate at trial that the policy "manifests 'deliberate indifference,' insofar as it entails denying treatment to prisoners who completed substance-abuse programs in the past and have since displayed no signs of drug or alcohol use." Conti v. Goord, 59 Fed.Appx. 434, 436, 2003 WL 1228044 (2d Cir. Mar. 14, 2003). The plaintiff in Conti, like the plaintiff in this case, was denied treatment because he refused to enroll in an ASAT program notwithstanding his history of drug and alcohol use. Id. at 435. The plaintiff there claimed that he was "demonstrably 'clean' for more than ten years", and he produced evidence to the Second Circuit (but not to the district court) that he had successfully completed an ASAT program in 1991, as well as an Alcoholics Anonymous program in 1992. Id. at 436. The plaintiff there also produced a response by Wright to a grievance submitted by another inmate, in which Wright indicated that that inmate would receive HCV treatment once he could establish that he had been "clean" for six months -- no mention is made of whether enrollment in an ASAT program would also be required. See id. Finally, the plaintiff there produced affidavits from two inmates who presumably also had a history of drug or alcohol use, but who claimed to have been provided with HCV treatment without being required to participate in an ASAT program. See id. The Court does not cite Conti as precedential authority.

his medical condition is objectively serious, and that each defendant acted with the requisite deliberate indifference. See Brock, 315 F.3d at 162.

1. Serious Medical Condition

A condition is considered "sufficiently serious" for Eighth Amendment purposes if it is a "condition of urgency, one that may produce death, degeneration, or extreme pain." Morales v. Mackalm, 278 F.3d 126, 132 (2d Cir. 2002). Factors to be considered in making this decision include "(1) whether a reasonable doctor or patient would perceive the medical need in question as important and worthy of comment or treatment, (2) whether the medical condition significantly affects daily activities, and (3) the existence of chronic and substantial pain." Brock, 315 F.3d at 162 (internal quotations omitted).

Defendants do not appear to deny, nor could they, that hepatitis C is, in general, a sufficiently serious medical condition for purposes of the Eighth Amendment. See, e.g., Pabon, 2004 WL 628784, at *5 ("It is well-established that Hepatitis C qualifies as a serious medical condition for purposes of an Eighth Amendment analysis."); Verley v. Goord, No. 02 Civ. 1182(PKC)(DF), 2004 WL 562740, at *10, n.11 (S.D.N.Y. Jan. 23, 2004) (Report and Recommendation adopted by order, dated June 2, 2004) (same); McKenna, 2002 WL 338375, at *6 (same).

Defendants argue, however, that when an inmate claims only that his treatment has been delayed, the relevant inquiry should

focus not only on whether the underlying condition is serious, but also on whether the challenged delay or interruption in treatment is objectively serious. See Smith v. Carpenter, 316 F.3d 178, 185-87 (2d Cir. 2003). In this case, defendants argue that plaintiff's treatment has merely been delayed, and that he has offered no evidence, such as "verifying medical evidence" or "expert evidence", to support his claim that his illness has gotten worse during the period in which treatment has been withheld from him. (Memorandum of Law in Support of Defendants' Motion for Summary Judgment ("Defs' Memo"), dated Jan. 30, 2004, at 12).

Plaintiff's claim in the instant case is distinguishable from the plaintiff's claim in Smith.[17] The plaintiff in this case is not complaining about a delay or interruption in his on-going treatment. Rather, plaintiff has never received any treatment for his illness, nor can he expect to receive any such treatment unless either he agrees to join an ASAT program, or the DOCS decides to provide such treatment notwithstanding plaintiff's failure to participate in such a program. Where, as here, a prisoner "alleges that prison officials have failed to provide general treatment for his medical condition," courts do not "distinguish between a prisoner's underlying 'serious medical condition' and the

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[17] In Smith, the plaintiff was HIV-positive, and it was undisputed that he was receiving "appropriate on-going treatment for his condition." Smith, 316 F.3d at 185-86. The basis for Smith's Eighth Amendment claim was that defendants had interrupted his treatment for two short periods of 5 days and 7 days in duration. See id. at 185. The Court held that it was appropriate to consider not just the seriousness of Smith's illness (i.e., HIV), but also the seriousness of the two brief interruptions in Smith's treatment.

circumstances of his 'serious medical need.'" Id. at 185-86. Thus, on the facts of this case, plaintiff has sufficiently established that he has a serious medical condition simply by proving that he has hepatitis C, and that he has not received any treatment for this condition.

2. Deliberate Indifference

Mere negligence, even if it rises to the level of medical malpractice, is insufficient to establish a claim under the Eighth Amendment. See Estelle, 429 U.S. at 105-06. In order to prevail on plaintiff's Eighth Amendment claim, plaintiff must ultimately prove that each defendant "knew of and disregarded [his] serious medical needs." Chance, 143 F.3d at 703 (citing Farmer, 511 U.S. at 837). Actual knowledge of the risk may be proven either by direct evidence, or circumstantial evidence, such as "evidence that the risk was obvious or otherwise must have been known to a defendant." Brock, 315 F.3d at 164 (citing Farmer, 511 U.S. at 842). For the reasons stated below, the Court holds that a reasonable jury could find that defendant Wright knew of and disregarded plaintiff's serious medical needs, because he promulgated ambiguous Practice Guidelines that have been applied to plaintiff in an unconstitutional manner. However, because defendant Koenigsmann was merely charged with applying the Practice Guidelines, a reasonable jury could not conclude that Koenigsmann showed deliberate indifference to plaintiff's serious medical needs.

Defendants argue that plaintiff cannot prove that either was deliberately indifferent, because the decision to condition plaintiff's treatment on his participation in an ASAT program was required by the DOCS Hepatitis C Practice Guidelines. However, the Practice Guidelines do not unambiguously require an inmate like plaintiff to participate in an ASAT program in order to receive treatment for HCV. The March 1999 and December 1999 Practice Guidelines are ambiguous as to who must participate in an ASAT program.[18] Since December 2000, when the active substance abuse criterion was merged with the ASAT criterion, the Practice Guidelines have required inmates with "a substance use history" to satisfy the ASAT requirement, but the Practice Guidelines provide no guidance as to who qualifies as having "a substance use history." The ambiguity of the Practice Guidelines is evidenced by the fact that the ASAT requirement appears to be inconsistently applied.[19]

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[18] The March 1999 Guideline, which was in place at the time that plaintiff was referred for his first and only liver biopsy, states that one requirement in order to receive treatment is: "10. No evidence of active substance abuse (drugs and/or alcohol) during the past 2 years (check urine toxicology screen if drug use is suspected)." (March 1999 Guideline, 3). A separate requirement is: "11: Successful completion of an ASAT program (the inmate may be enrolled concurrently with hepatitis C treatment if time does not allow for prior completion of the program)." (Id.). The December 1999 Practice Guideline reduced the 2-year bar for evidence of active substance use to a period of 6-months. (See December 1999 Guideline, 3). Although these two versions of the Practice Guidelines could be read as requiring every inmate to enroll in an ASAT program--including those who have never used drugs or alcohol--defendants do not argue that the Practice Guidelines were intended to be applied in this manner.

[19] The Court has already discussed instances in which inmates like plaintiff appear to have been given drug treatment notwithstanding the fact that they did not enroll in an ASAT program. See supra, n. 15 & 16. The fact that plaintiff in this case was referred to a liver specialist in 1999 for a liver biopsy also suggests that the Practice Guidelines have not always been

Defendants interpret the ambiguous provisions in the Practice Guidelines as requiring any inmate who has ever abused drugs and alcohol to enroll in an ASAT program. Thus, although there is no evidence that plaintiff has actively used drugs or alcohol in the past thirteen years, defendants interpret the Guidelines as requiring plaintiff to enroll in an ASAT program before receiving treatment.[20]

There is no medical justification for such a policy in any of the medical reports purportedly relied upon by the DOCS in fashioning its Practice Guidelines. The medical reports all indicate that complications may arise when treatment is given to persons who actively use drugs or alcohol. See National Institutes of Health, Consensus Development Conference Statement, Management of Hepatitis C: 1997 ("1997 NIH Consensus Statement"), dated Mar. 24-26, 1997, at 18 (available at http://consensus.nih.gov/cons/105/105_statement.pdf) (last visited

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applied consistently. According to defendants, because of plaintiff's "substance use history," it was just as true in 1999 as it is today, that plaintiff was required to enroll in an ASAT program in order to get treatment for his illness. Nonetheless, defendants admit that plaintiff received a liver biopsy in 1999, notwithstanding the fact that plaintiff was not enrolled in an ASAT program at that time. As discussed above, Koeingsmann has since denied plaintiff an updated liver biopsy because of plaintiff's failure to enroll in an ASAT program.

[20] The Court notes that a more logical interpretation of the language in the December 2000 Guideline (which is identical to the current version of the Practice Guidelines) is that no inmate may receive HCV treatment if there is evidence of active substance abuse in the past six months, and that any inmate against whom there is such evidence would be required to enroll in an ASAT program prior to receiving HCV treatment. This interpretation construes the sentence pertaining to inmates with a "substance use history" in conjunction with the immediately previous sentence pertaining to inmates against whom there is evidence of active substance abuse within the past six months. Such an interpretation appears to be reasonable in light of the DOCS' decision to merge those two criteria into a single paragraph in December 2000.

Aug. 4, 2004) ("[T]reatment of patients who are drinking significant amounts of alcohol or who are actively using illicit drugs should be delayed until these habits are discontinued for at least 6 months . . . . Treatment for addiction should be provided before treatment for hepatitis C.") (emphases added); Centers for Disease Control and Prevention, "Recommendations for Prevention and Control of Hepatitis C Virus (HCV) Infection and HCV-Related Chronic Disease" ("CDC Recommendations"), dated October 16, 1998, at 14 ("Treatment of patients who are drinking excessive amounts of alcohol or who are injecting illegal drugs should be delayed until these behaviors have been discontinued for ≥6 months.") (emphases added); G.L. Davis and J.R. Rodrigue, "Treatment of Chronic Hepatitis C in Active Drug Users", New Engl. J. Med., Vol. 354 No. 3, July 19, 2001 (noting that most physicians will withhold antiviral treatment until active drug use has stopped, and stating that consensus statements support resuming treatment for patients for whom treatment has stopped due to active drug use only after the patient has been referred for treatment of the addiction).[21]

The CDC Recommendations, which were issued shortly before the DOCS adopted the first version of the Practice Guidelines,

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[21] The 2002 NIH Consensus Statement recommends that the treatment of both inmates and active drug and alcohol users be expanded. (See National Institutes of Health, Consensus Development Conference Statement, Management of Hepatitis C: 2002 ("2002 NIH Consensus Statement"), dated Aug. 26, 2002, Defs' Reply Memo, Exh. C (also available at http://consensus.nih.gov/cons/116/hepatitis_c_consensus.pdf) (last visited Sept. 24, 2004), 22 & 25) ("[I]t is recommended that treatment of active injection drug use be considered on a case-by-case basis, and that active injection drug use in and of itself not be used to exclude such patients from antiviral therapy.") (emphases added).

specifically recommend that "[p]ersons who use or inject drugs . . . be advised to stop using and injecting drugs [and] to enter and complete substance-abuse treatment, including relapse-prevention programs." (CDC Recommendations, at 18) (emphasis added). Thus, the CDC recommended in 1998 that persons who were actively drinking excessive amounts of alcohol or were actively injecting drugs be denied treatment for a limited period of time until the behavior ceased, and that those people be encouraged to enter substance-abuse treatment programs, presumably for the purpose of successfully stopping the behavior that is delaying their ability to receive treatment.

A reasonable jury could conclude that defendant Wright promulgated an ambiguous set of Practice Guidelines that resulted in the denial of necessary medical care to plaintiff without any medical justification.[22] A reasonable jury could also conclude that defendant Wright was aware of the risk that the ambiguous Practice Guidelines would be interpreted to condition HCV treatment for a person such as plaintiff on enrollment in an ASAT program, and that

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[22] In addition to promulgating the Practice Guidelines, the Court notes that plaintiff notified Wright by letter of Koenigsmann's refusal to approve HCV treatment. (See Letter to Dr. Wright, dated Aug. 27, 2002, Plnt's 56.1 Stmt. Exh. 4). Marc Stern, responding on Wright's behalf, wrote: "Your participation in [an ASAT program] is required by our Guidelines and is non-negotiable . . . . While consultants may make other recommendations, ultimately the decisions about your medical care are made by your primary care physicians under the direction of the Facility Health Services Director and not the consultants. We appreciate their recommendations, but they are just that: recommendations." (See Letter to Mr. Morgan, dated Sept. 30, 2002, Plnt's 56.1 Stmt. Exh. 5). Given that plaintiff's primary care physicians made recommendations that were denied by the Facility Health Services Director (i.e., Koenigsmann) because of the Practice Guidelines promulgated by Wright, it is unclear in what way the "ultimate[]" decisions about plaintiff's medical care rested with the primary care physicians and the FHSD.

Wright was aware of the risk that people such as plaintiff would face as a result of such an interpretation. See Brock, 315 F.3d at 165-67. Cf. id. at 164 (stating that actual knowledge of the risk may be proven by circumstantial evidence, such as "evidence that the risk was obvious or otherwise must have been known to a defendant") (citing Farmer, 511 U.S. at 837). Dr. Wright could thus be held liable for the unconstitutional acts that occurred as a result of the ambiguity in the Practice Guidelines that he promulgated.[23]

In contrast, a reasonable jury could not conclude that Koenigsmann was deliberately indifferent to plaintiff's serious medical needs. Even if a jury believed that Koenigsmann, himself medical doctor, was negligent in applying the Practice Guidelines to plaintiff in a medically unsupportable manner, there is no evidence from which a jury could conclude that he did so with knowledge of, and disregard for, plaintiff's serious medical needs.

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[23] The Court notes that even if defendants were correct that the Practice Guidelines are unambiguous in imposing the requirement that plaintiff enroll in an ASAT program, Wright would still not be entitled to summary judgment. A reasonable jury would nevertheless be able to conclude that plaintiff's constitutional rights were violated as a result of a policy promulgated by Wright that is without medical justification and resulted in deliberate indifference toward plaintiff's serious medical needs. See Brock, 315 F.3d at 165-67 (holding that if a policy, "properly implemented," results in deliberate indifference toward an inmate's medical needs, the plaintiff may be able to prevail on a claim against the person who promulgated the policy). Cf. Domenech, 196 Misc. 2d at 531 (holding that as applied to the plaintiff in that case, the Practice Guidelines' requirement that the plaintiff there participate in an ASAT program "is arbitrary and capricious and results in a deliberate denial of medical attention to his serious medical condition in violation of the Eighth Amendment." The plaintiff in Domenech claimed to be drug- and alcohol-free for over 30 years, and respondents neither alleged, nor presented evidence to suggest, that he was currently using drugs or alcohol, or was likely to relapse. The Court thus concluded that "the ASAT program is irrelevant for this petitioner and cannot, as a matter of law, provide a medical justification for the continued denial of medical treatment.").

D. Qualified Immunity

The doctrine of qualified immunity protects state actors sued in their individual capacity from suits for monetary damages if "their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." Ford v. McGinnis, 352 F.3d 582, 596 (2d Cir. 2003) (quoting Harlow v. Fitzgerald, 457 U.S. 800, 818 (1982)). Summary judgment is appropriate:

> only if the court finds that the asserted rights were not clearly established, or if the evidence is such that, even when it is viewed in the light most favorable to the plaintiff[] and with all permissible inferences drawn in [his] favor, no rational jury could fail to conclude that it was objectively reasonable for the defendants to believe that they were acting in a fashion that did not violate a clearly established right.

Ford, 352 F.3d at 597 (citation and internal quotation omitted).

The Eighth Amendment right that plaintiff claims was violated by defendants through their deliberate indifference to his serious medical needs was clearly established throughout the period covered in this suit. See Verley, 2004 WL 562740, at *17; McKenna v. Wright, No. 01 Civ. 6571(HB), 2004 WL 102752, at *7 (S.D.N.Y. Jan. 21, 2004) (citing Estelle, 429 U.S. at 106).

Because the right in question was clearly established, summary judgment may not be granted if a rational jury could conclude, on the evidence presented, that it was not objectively reasonable for Wright to believe that he was acting in a constitutional manner.[24]

[24] Because the Court has concluded that Koenigsmann is entitled to summary judgment with respect to liability, the Court need not consider whether he would otherwise be entitled to qualified immunity. The Court

Viewing the evidence in the light most favorable to plaintiff, and drawing all permissible inferences in plaintiff's favor, the Court cannot conclude that Wright's belief that his acts were constitutional was objectively reasonable as a matter of law.

As explained above, a rational jury could conclude that as a result of the ambiguity in the Practice Guidelines, plaintiff was denied necessary medical care for his serious, chronic illness, without medical justification. A rational jury could also conclude that it was not objectively reasonable for Wright to have believed that it was constitutional to promulgate such ambiguous set of Practice Guidelines that would permit such an interpretation.[25]

III. Conclusion

For the reasons set forth above, the Court grants defendants' motion for summary judgment with respect to defendant Koenigsmann, and denies defendants' motion with respect to defendant Wright. The parties shall submit a joint pretrial order no later than October 29, 2004. The parties are directed to adhere to this Court's Individual Rules governing the form of Joint Pretrial

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notes, however, that given the ambiguity present in the Practice Guidelines promulgated to Koenigsmann by Wright, no rational jury could fail to conclude that it was objectively reasonable for Koenigsmann to believe that he was acting in a constitutional manner.

[25] Even if the Practice Guidelines were not ambiguous, Wright would still not be entitled to qualified immunity. A rational jury could conclude that it was objectively unreasonable for Wright to believe that it was constitutional to promulgate a regulation that requires prison officials who know of an inmate's serious medical needs to disregard those needs, unless the inmate agrees to participate in an ASAT program. The fact that Wright is a medical doctor who is experienced at supervising the provision of medical services to inmates supports the Court's conclusion that a jury could find his actions objectively unreasonable. See Cuoco v. Moritsugu, 222 F.3d 99, 111 (2d Cir. 2000).

Orders. The Individual Rules are available at http://www.nysd.uscourts.gov/Individual_Practices/Wood.pdf.

SO ORDERED.

Dated: New York, New York

September 30, 2004

Kimba M. Wood

Kimba M. Wood

United States District Judge

Copies of this Order have been mailed to pro se plaintiff and counsel for defendants.

Slip Copy
Slip Copy, 2005 WL 1802851 (S.D.N.Y.)
(Cite as: 2005 WL 1802851 (S.D.N.Y.))

Motions, Pleadings and Filings

Only the Westlaw citation is currently available.

United States District Court,
S.D. New York.
Lawrence FOGARAZZO and Carolyn Fogarazzo,
Joint Tenants With Rights of
Survivorship, Stephen L. Hopkins, and Don Engel on
behalf of themselves, and
all others similarly situated, Plaintiffs,
v.
LEHMAN BROTHERS, INC., Goldman Sachs &
Co., and Morgan Stanley & Co., Inc.,
Defendants.
No. 03 Civ. 5194(SAS).

July 29, 2005.

Curtis V. Trinko, Neal A. DeYoung, Jeffrey B. Silverstein, Law Offices of Curtis V. Trinko, LLP, New York, New York, for Plaintiffs.

Alexander Dimitrief, P.C., Peter D. Doyle, Katherine J. Alprin, Kirkland & Ellis LLP, New York, New York, for Defendant Morgan Stanley & Co., Inc.

Moses Silverman, H. Christopher Boehning, Paul, Weiss, Rifkind, Wharton & Garrison LLP, New York, New York, for Defendant Lehman Brothers, Inc.

David H. Braff, Stephanie G. Wheeler, Sullivan & Cromwell LLP, New York, New York, for Defendant Goldman Sachs & Co.

OPINION AND ORDER

SCHEINDLIN, J.

I. INTRODUCTION

***1** Plaintiffs, a class of investors who bought shares of RSL Communications, Inc. ("RSL"), allege that defendants, three investment banks, fraudulently manipulated the price of RSL stock by issuing materially misleading analyst reports. Plaintiffs now move for class certification and defendants oppose the motion, asserting that individual questions of law and fact predominate over common questions.

II. FACTS

On May 21, 2004, I issued an Opinion denying defendants' motions to dismiss and summarizing plaintiffs' claims. [FN1] Familiarity with that Opinion is assumed.

FN1. *See Fogarazzo v. Lehman Bros., Inc.*, 341 F.Supp.2d 274 (S . D.N.Y.2004).

Plaintiffs assert that defendants Lehman Brothers, Inc. ("Lehman"), Goldman Sachs & Co. ("Goldman") and Morgan Stanley & Co. ("Morgan") engaged in a fraudulent scheme "to distort, falsify, or otherwise manipulate their equity analyst reports on RSL Communications, Inc. ("RSL" [ ]), in exchange for lucrative investment banking business, fees, and other [ ] profits as a result of their relationships with RSL." [FN2] "In sum, the Banks, knowing that RSL was actually in decline, inflated the price of RSL shares and then worked doubly hard to conceal or obfuscate the meaning of every fact that would have revealed that decline to the investing public." [FN3]

FN2. Memorandum of Law in Support of Motion for Class Certification ("Pl.Mem.") at 2.

FN3. *Fogarazzo*, 341 F.Supp.2d at 292.

Plaintiffs seek certification of a purported class that includes "all persons who purchased or otherwise acquired shares of RSL equities during the period from April 30, 1999 through December 29, 2000, both dates inclusive." [FN4] Plaintiffs assert that "hundreds, if not thousands, of geographically dispersed members" belong to the proposed class. [FN5] Plaintiffs seek appointment of the named plaintiffs as class representatives and assert that the named plaintiffs have claims "virtually identical to [ ] those of the members of the Class." [FN6] Plaintiffs also assert that the named plaintiffs "have been actively committed to litigating this case for at least two years," "are committed to conducting the vigorous prosecution required to remedy those damages [ ] suffered," and are subject to no unique defenses. [FN7]

FN4. Complaint ¶ 13.

FN5. Pl. Mem. at 7.

FN6. *Id.* at 11.

FN7. *Id.*

III. LEGAL STANDARD

A. Standard of Review

The Second Circuit requires a "liberal" construction of Rule 23 of the Federal Rules of Civil Procedure ("Rule 23"). [FN8] Thus, "to deny a class action simply because all of the allegations of the class do not fit together like pieces in a jigsaw puzzle [ ] would destroy much of the utility of Rule 23." [FN9] Notwithstanding the general liberality in this circuit towards class certification motions, the Supreme Court unequivocally requires district courts to undertake a "rigorous analysis" that the requirements of Rule 23 have been satisfied. [FN10]

FN8. *See Korn v. Franchard Corp.*, 456 F.2d 1206 (2d Cir.1972); *In re Lloyd's Am. Trust Fund Litig.*, No. 96 Civ. 1262, 1998 WL 50211, at * 5 (S.D.N.Y. Feb. 6, 1998) ("The Second Circuit has directed district courts to apply Rule 23 according to a liberal rather than a restrictive interpretation.").

FN9. *Green v. Wolf Corp.*, 406 F.2d 291, 300 (2d Cir.1968).

FN10. *General Tel. Co. of the Southwest v. Falcon*, 457 U.S. 147, 161 (1982).

In ruling on class certification, a district court may not simply accept the allegations of plaintiffs' complaint as true. [FN11] Rather, it must determine, after a "rigorous analysis," whether the proposed class comports with all of the elements of Rule 23. "[S]ometimes it may be necessary for the court to probe behind the pleadings before coming to rest on the certification question.... [A]ctual, not presumed, conformance with Rule 23(a) remains ... indispensable." [FN12]

FN11. *See In re Initial Public Offering Sec. Litig. ("In re IPO")*, 227 F.R.D. 65, 91 (S.D.N.Y.2004).

FN12. *Falcon*, 457 U.S. at 161.

***2** "In order to pass muster, plaintiffs--who have the burden of proof at class certification--must make *'some showing" '* that the proposed class comports with Rule 23. [FN13] That showing may take the form of, for example, expert opinions, evidence (by document, affidavit, live testimony, or otherwise), or the uncontested allegations of the complaint. However, "a district court is forbidden to weigh the evidence on class certification [and] plaintiffs need not establish the elements of Rule 23 by a preponderance of the evidence." [FN14]

FN13. *In re IPO*, 227 F.R.D. at 93 (quoting *Caridad v. Metro-North Commuter R.R.*, 191 F.3d 283, 292 (2d Cir.1999)) (emphasis in original).

FN14. *Id.* (citing *Caridad*, 191 F.3d at 293).

B. The Requirements of Rule 23

Rule 23 governs class certification. To be certified, a putative class must meet all four requirements of Rule 23(a) as well as the requirements of one of the three subsections of Rule 23(b). In this case, as in most cases seeking money damages, plaintiffs bear the burden of demonstrating that the class meets the requirements of Rule 23(a)--referred to as numerosity, commonality, typicality, and adequacy [FN15]--and that the action is "maintainable" under Rule 23(b)(3). [FN16] Under Rule 23(b)(3)--the only applicable subsection of Rule 23(b)--"common" issues of law or fact must "predominate over any questions affecting only individual members," and a class action must be demonstrably "superior" to other methods of adjudication. [FN17]

FN15. *See Caridad*, 191 F.3d at 291.

FN16. *See Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 614 (1997).

FN17. Fed.R.Civ.P. 23(b)(3).

1. Rule 23(a)

a. Numerosity

Rule 23 requires that the class be "so numerous that joinder of all members is impracticable." [FN18] "Impracticability does not mean impossibility of joinder, but refers to the difficulty or inconvenience of joinder." [FN19] Although precise calculation of the number of class members is not required, and it is permissible for the court to rely on reasonable inferences drawn from available facts, numbers in excess of forty generally satisfy the numerosity requirement. [FN20]

FN18. Fed.R.Civ.P. 23(a)(1).

FN19. *In re Independent Energy Holdings PLC Sec. Litig.,* 210 F.R . D. 476, 479 (S.D.N.Y.2002) (citing *In re Avon Sec. Litig.,* No. 91 Civ. 2287, 1998 WL 834366, at *5 (S.D.N.Y. Nov. 30, 1998)).

FN20. *See Trief v. Dun & Bradstreet Corp.,* 144 F.R.D. 193, 198 (S.D.N.Y.1992).

b. Commonality

Commonality requires a showing that common issues of fact or law affect all class members. [FN21] A single common question may be sufficient to satisfy the commonality requirement. [FN22] "The critical inquiry is whether the common questions are at the core of the cause of action alleged." [FN23]

FN21. *See* Fed.R.Civ.P. 23(a)(2); *see also Trief,* 144 F.R.D. at 198.

FN22. *See German v. Federal Home Loan Mortgage Corp.,* 885 F.Supp. 537, 553 (S.D.N.Y.1995).

FN23. *D'Alauro v. GC Services Ltd. P'ship,* 168 F.R.D. 451, 456 (E.D.N.Y.1996) (quotation omitted). *See also In re "Agent Orange" Prod. Liab. Litig.,* 818 F.2d 145, 166-67 (2d Cir.1987).

The commonality requirement has been applied permissively in securities fraud litigation. [FN24] In general, where putative class members have been injured by similar material misrepresentations and omissions, the commonality requirement is satisfied. [FN25]

FN24. *See In re Blech Sec. Litig.,* 187 F.R.D. 97, 104 (S.D.N.Y.1999).

FN25. *See, e.g., Blackie v. Barrack,* 524 F.2d 891, 902 (9th Cir.1975) ("Confronted with a class of purchasers allegedly defrauded over a period of time by similar misrepresentations, courts have taken the common sense approach that the class is united by a common interest in determining whether a defendant's course of conduct is in its broad outlines actionable...."); *In re Baldwin-United Corp. Litig.,* 122 F.R.D. 424, 426 (S.D.N.Y.1986) ("The nub of plaintiffs' claims is that material information was withheld from the entire putative class in each action, either by written or oral communication. Essentially, this is a course of conduct case, which as pled satisfies the commonality requirement of Rule 23....").

c. Typicality

The typicality requirement "is not demanding." [FN26] A named plaintiff's claims are "typical" pursuant to Rule 23(a)(3) where each class member's claims arise from the same course of events and each class member makes similar legal arguments to prove the defendants' liability. [FN27] "The rule is satisfied ... if the claims of the named plaintiffs arise from the same practice or course of conduct that gives rise to the claims of the proposed class members." [FN28]

FN26. *Forbush v. J.C. Penney Co.,* 994 F.2d 1101, 1106 (5th Cir.1993) (citing *Shipes v. Trinity Indus.,* 987 F.2d 311, 316 (5th Cir.1993)).

FN27. *See Robinson v. Metro-North Commuter R.R. Co.,* 267 F.3d 147, 155 (2d Cir.2001).

FN28. *Marisol A. v. Giuliani,* 929 F.Supp. 662, 691 (S.D.N.Y.1996), *aff'd,* 126 F.3d 372 (2d Cir.1997).

In addition, a putative class representative's claims are not typical if that representative is subject to unique defenses. [FN29] The test is whether the defenses will become the focus of the litigation, overshadowing the primary claims and prejudicing other class members. [FN30] Accordingly, the commonality and typicality requirements " 'tend to merge' because '[b]oth serve as guideposts for determining whether ... the named plaintiff's claim and the class claims are so inter-related that the interests of the class members will be fairly and adequately protected in their absence." ' [FN31]

FN29. *See Baffa v. Donaldson, Lufkin & Jenrette Sec. Corp.,* 222 F.3d 52, 59 (2d Cir.2000).

FN30. *See Landry v. Price Waterhouse Chartered Accountants,* 123 F.R.D. 474, 476 (S.D.N.Y.1989).

FN31. *Caridad,* 191 F.3d at 291 (alterations in original) (quoting *Falcon,* 457 U.S. at 157 n. 13).

d. Adequacy

***3** Plaintiffs must also show that "the representative parties will fairly and adequately protect the interests of the class." [FN32] To do so, plaintiffs must demonstrate that the proposed class representatives have no "interests [that] are antagonistic to the interest of other members of the class." [FN33] Courts have also considered "whether the putative representative is familiar with the action, whether he has abdicated control of the litigation to class counsel, and whether he is of sufficient moral character to represent a class." [FN34]

FN32. Fed.R.Civ.P. 23(a)(4). *See also Banyai v. Mazur,* 205 F.R.D. 160, 164 (S.D.N.Y.2002).

FN33. *Baffa,* 222 F.3d at 60. An antagonistic interest arises when there is a "fundamental conflict or inconsistency between the claims of the proposed class members" that is "so palpable as to outweigh the substantial interest of every class member in proceeding with the litigation." *In re NASDAQ Market-Makers Antitrust Litig.,* 169 F.R.D. 493, 514-15 (S.D.N.Y.1996). *See also Robinson,* 267 F.3d at 170 (holding that Rule 23(a)(4) requires "absence of conflict" between named representatives and class, as well as "vigorous prosecution").

FN34. *Noble v. 93 University Place Corp.,* No. 02 Civ. 1803, 2004 WL 944543, at *4 (S.D.N.Y. May 3, 2004) (citations omitted).

Class representatives cannot satisfy Rule 23(a)(4)'s adequacy requirement if they "have so little knowledge of and involvement in the class action that they would be unable or unwilling to protect the interests of the class against the possibly competing interest of the attorneys." [FN35] However, it is well established that "in complex litigations such as securities actions, a plaintiff need not have expert knowledge of all aspects of the case to qualify as a class representative, and a great deal of reliance upon the expertise of counsel is to be expected." [FN36]

FN35. *Baffa,* 222 F.3d at 61 (quotations and citation omitted).

FN36. *In re AM Int'l, Inc. Sec. Litig.* 108 F.R.D. 190, 196-97 (S . D.N.Y.1985).

e. Ascertainability

Although " 'Rule 23(a) does not expressly require that a class be definite in order to be certified[,] a requirement that there be an identifiable class has been implied by the courts." ' [FN37] "This implied requirement is often referred to as 'ascertainability." ' [FN38]

FN37. *In re Methyl Tertiary Butyl Ether Prod. Liab. Litig.,* 209 F.R.D. 323, 336 (S.D.N.Y.2002) (quoting *Zapka v. Coca-Cola Co.,* No. 99 Civ. 8238, 2000 WL 1644539, at *2 (N.D.Ill. Oct. 27, 2000)).

FN38. *Id.* (citing *Van West v. Midland Nat'l Life Ins. Co.,* 199 F.R.D. 448, 451 (D.R.I.2001); *In re Copper Antitrust Litig.,* 196 F.R.D. 348, 358 (D.Wis.2000)).

"An identifiable class exists if its members can be ascertained by reference to objective criteria." [FN39] "Class members need not be ascertained prior to certification, but 'the exact membership of the class must be ascertainable at some point in the case." ' [FN40] It must thus be "administratively feasible for a court to determine whether a particular individual is a member" of the class. [FN41] "The Court must be able to make this determination without having to answer numerous [individualized] fact-intensive questions." [FN42]

FN39. *Id.* at 337 (quoting *Zapka,* 2000 WL 1644539, at *2). *See also Clay v. American Tobacco Co.,* 188 F.R.D. 483, 490 (S.D.Ill.1999); *Gomez v. Illinois State Bd. of Educ.,* 117 F.R.D. 394, 397 (N.D.Ill.1987).

FN40. *Id.* (quoting *Rios v. Marshall,* 100 F.R.D. 395, 403 (S.D.N.Y.1983)).

FN41. *Rios,* 100 F.R.D. at 403 (citing 7 Charles Alan Wright, Arthur R. Miller & Mary Kay Kane, Fed. Prac. & Proc. § 1760 at 581 (1972)).

FN42. *Daniels v. City of New York,* 198 F.R.D. 409, 414 (S.D.N.Y.2001) (quotation omitted). A plaintiff's failure to plead a class that can be ascertained without subjective individual inquiries may cause individual issues (*i.e.,* whether each individual class member belongs in the class) to predominate. Consequently, the question of ascertainability takes on great importance in 23(b)(3) class actions, which may only be certified if common questions--not individual inquiries--predominate. *See infra* Part IV.B.

2. Rule 23(b)

If plaintiffs can demonstrate that the proposed class satisfies the elements of Rule 23(a), they must then establish that the action is "maintainable" as defined by Rule 23(b). Rule 23(b) provides that "an action may be maintained as a class action if the prerequisites of subdivision (a) are satisfied, and in addition" one of three alternative definitions of maintainability is met. Plaintiffs argue that these putative class actions are maintainable under subsection (b)(3), which requires "that 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." [FN43] Rule 23(b)(3) thus has two elements: "predominance" and "superiority."

FN43. Fed.R.Civ.P. 23(b)(3).

a. Predominance

"In order to meet the predominance requirement of Rule 23(b)(3), a plaintiff must establish 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 only to individualized proof." [FN44] "The 23(b)(3) predominance requirement is 'more stringent' and 'far more demanding than' the commonality requirement of Rule 23(a)." [FN45] Courts frequently have found that the requirement was not met where, notwithstanding the presence of common legal and factual issues that satisfy the commonality requirement, individualized inquiries predominate. [FN46] Nonetheless, the Supreme Court has noted that "[p]redominance is a test readily met in certain cases alleging consumer or securities fraud...." [FN47]

FN44. *In re VISA Check/MasterMoney Antitrust Litig.*, 280 F.3d 124, 136 (2d Cir.2001) (quotation marks and citation omitted).

FN45. *Maneely v. City of Newburgh*, 208 F.R.D. 69, 76 (S.D.N.Y.2002) (quoting *Amchem Prods.*, 521 U.S. at 623-24).

FN46. *See, e.g., In re MTBE*, 209 F.R.D. at 350 (finding individual issues predominate although defendants conceded commonality); *Augustin v. Jablonsky*, No. 99-CV-3126, 2001 WL 770839, at *13 (E.D.N.Y. Mar. 8, 2001) (finding individualized issues of proximate causation predominate despite plaintiffs' showing of commonality under Rule 23(a)(2)); *Martin v. Shell Oil Co.*, 198 F.R.D. 580, 592-93 (D.Conn.2000) (finding individualized proof of breach, causation, and trespass predominates where commonality was not contested).

FN47. *Amchem Prods.*, 521 U.S. at 625.

b. Superiority

***4** The superiority prong of Rule 23(b)(3) requires a court to consider whether a class action is superior to other methods of adjudication. [FN48] The court should consider, *inter alia,* "the interest of the members of the class in individually controlling the prosecution or defense of separate actions" and "the difficulties likely to be encountered in the management of a class action." [FN49]

FN48. *See* Fed.R.Civ.P. 23(b)(3); *see also Eisen v. Carlisle & Jacquelin*, 417 U.S. 156, 164 (1974).

FN49. Fed.R.Civ.P. 23(b)(3).

3. Rule 23(g)

Rule 23(g) requires a court to assess the adequacy of proposed class counsel. To that end, the court *must* consider the following: (1) the work counsel has done in identifying or investigating potential claims in the action, (2) counsel's experience in handling class actions, other complex litigation, and claims of the type asserted in the action, (3) counsel's knowledge of the applicable law, and (4) the resources counsel will commit to representing the class. [FN50] "The court *may* also consider any other matter pertinent to counsel's ability to fairly and adequately represent the interests of the class." [FN51]

FN50. *See In re IPO*, 227 F.R.D. at 89 (quotation marks and citation omitted). *See also In re Drexel Burnham Lambert Group, Inc.*, 960 F.2d 285, 291 (2d Cir.1992) ("[C]lass counsel must be qualified, experienced and generally able to conduct the litigation.") (quotation marks and citation omitted).

FN51. Rule 23(g)(1)(C)(ii) (emphasis added).

IV. DISCUSSION

A. Rule 23(a) and Rule 23(g)

Defendants do not argue that the purported class fails to comply with the requirements of Rule 23(a). [FN52] I find that plaintiffs have met their burden to make "some showing" that the proposed class satisfies Rule 23(a).

FN52. *See* Defendants' Memorandum of Law in Opposition to Plaintiffs' Motion for Class Certification ("Def.Opp.") at 1 (noting that defendants address "two fundamental reasons" why plaintiffs' class might not be certified--transaction causation and loss causation--both of which address the Rule 23(b)(3) predominance requirement).

With respect to numerosity, plaintiffs assert "that there are many hundreds, if not thousands, of geographically dispersed members of the proposed class." [FN53] Indeed, because plaintiffs allege fraud in connection with publicly traded securities, common sense dictates that the purported plaintiff class is likely quite numerous . [FN54] Accordingly, plaintiffs have satisfied the Rule 23(a)(1) numerosity requirement. Similarly, because the proposed class includes all purchasers of RSL securities during a given time period, it presents no unusual difficulties in ascertaining class membership. [FN55]

FN53. Pl. Mem. at 7.

FN54. *See In re Blech Sec. Litig.*, 187 F.R.D. 97, 103 (S.D.N.Y.1999).

FN55. *Cf. In re IPO*, 227 F.R.D. at 100-01 (addressing ascertainability difficulties where some purchasers of the subject securities were active participants in the alleged scheme; certifying class definition that screened out likely participants).

With respect to the Rule 23(a)(2) commonality requirement, plaintiffs note that the following questions are common to all class members: whether defendants' analyst reports contained misrepresentations or omissions; whether those misstatements were material; whether those misstatements were issued as part of improper *quid pro quo* arrangements; whether those misstatements artificially inflated securities prices; and whether class members sustained damages when artificial inflation dissipated. [FN56] Although defendants contend that individual questions predominate over these common questions, plaintiffs have satisfied Rule 23(a)(2)'s requirement that "there are questions of law or fact common to the class."

FN56. *See* Pl. Mem. at 8-9.

The proposed class representatives--Lawrence Fogarazzo, Carolyn Fogarazzo, Stephen L. Hopkins and Don Engel--satisfy the remaining Rule 23(a) requirements of typicality and adequacy. The representatives' claims are based on the same allegations of misconduct as those of all other class members, and no class representative appears to have any conflicts of interest with other members of the class. [FN57] Moreover, defendants have not asserted any unique defenses with respect to any of the class representatives, and the representatives have fulfilled their duties throughout the course of this litigation.

FN57. *See id.* at 9-12.

***5** Similarly, the representatives' choice of counsel, the Law Offices of Curtis V. Trinko, LLP ("Trinko"), is adequate to represent the interests of the class. Class counsel has more than 23 years of experience prosecuting securities fraud class actions. [FN58] Furthermore, class counsel has actively represented the purported class throughout this litigation. Accordingly, the class representatives' selection of Trinko as lead counsel satisfies Rule 23(g).

FN58. *See* Firm Resume, Ex. E to Declaration of Curtis V. Trinko, counsel for plaintiffs, in Support of Motion for Class Certification ("Trinko Decl.").

B. Predominance

Defendants oppose plaintiffs' motion for class certification on two grounds: *first*, that "common issues do not predominate because plaintiffs cannot establish transaction causation on a class-wide basis;" and *second*, that "common issues do not predominate because plaintiffs cannot establish loss causation by class-wide proof." [FN59] Both arguments rest on the predominance requirement of Rule 23(b)(3).

FN59. Def. Opp. at 7, 15.

1. Transaction Causation

In the securities fraud context, plaintiffs may prove transaction causation either on an individual basis or by showing that they are entitled to an established presumption of reliance. The distinction is crucial at the class certification stage. If transaction causation turns on whether the class as a whole is entitled to a presumption of reliance, then transaction causation is a common issue. If, on the other hand, each class member must individually prove reliance, then the

individualized transaction causation inquiry threatens to overwhelm any common issues that may be adjudicated, and class certification will likely be denied. [FN60]

FN60. *See In re PolyMedica Corp. Sec. Litig.*, 224 F.R.D. 27, 38- 39 (D.Mass.2004) (noting that individual showings of reliance would "overwhelm the common questions of fact and law," but that resort to a presumption obviates the need to prove reliance individually).

Plaintiffs assert that they are entitled to prove reliance through resort to two judicially established presumptions: (1) the fraud on the market presumption; and (2) the *Affiliated Ute* presumption. [FN61] Defendants contest the applicability of both presumptions.

FN61. *See Affiliated Ute Citizens v. United States*, 406 U.S. 128, 151 (1972). *Accord Castellano v. Young & Rubicam, Inc.*, 257 F.3d 171, 186 (2d Cir.2001); *Press v. Chemical Inv. Servs. Corp.*, 166 F.3d 529, 539 (2d Cir.1999)).

a. The Fraud on the Market Presumption

In *Basic, Inc. v. Levinson*, [FN62] the Supreme Court established the validity of the fraud on the market presumption:

FN62. 485 U.S. 224 (1988).

> The fraud on the market theory is based on the hypothesis that, in an open and developed securities market, the price of a company's stock is determined by the available material information regarding the company and its business.... Misleading statements will therefore defraud purchasers of stock even if the purchasers do not directly rely on the misstatements.... The causal connection between the defendants' fraud and the plaintiffs' purchase of stock in such a case is no less significant than in a case of direct reliance on misrepresentations. [FN63]

FN63. *Id.* at 241 -42 (quotation marks and citation omitted).

Defendants "submit that the *Basic* presumption does not apply to analyst reports." [FN64] Defendants acknowledge that no binding precedent compels such a conclusion, but point to the Second Circuit's Rule 23(f) grant of interlocutory review in *Hevesi v. Citigroup Inc.* [FN65] as evidence that "[t]he Second Circuit has recognized that substantial issues exist as to the applicability of the *Basic* presumption to analyst reports." [FN66] Defendants also rely on *DeMarco v. Lehman Bros., Inc.*, [FN67] in which Judge Jed Rakoff stated that "there is a qualitative difference between a statement of fact emanating from an issuer and a statement of opinion emanating from a research analyst." [FN68]

FN64. Def. Opp. at 17.

FN65. 366 F.3d 70, 77 (2d Cir.2004).

FN66. Def. Opp. at 16. The Second Circuit never decided the issues, though, because the parties in *Hevesi* settled before a decision was filed. *See DeMarco v. Robertson Stephens Inc.*, No. 03 Civ. 590, 2005 WL 120233, at *6 (S.D.N.Y. Jan 20, 2005). The Second Circuit has again granted review to determine "[w]hether the presumption of reliance established in *Basic* ... was properly extended to plaintiffs' claims against [ ] non-issuer defendants...." Order granting interlocutory appeal in *Miles v. Merrill Lynch & Co.*, No. 04-8026 (2d Cir. June 30, 2005). *See also* Pamela A. MacLean, *Investor Suits May Face New Challenge*, Nat'l L.J., July 18, 2005 (discussing the *Miles* order and collecting cases).

FN67. 222 F.R.D. 243 (S.D.N.Y.2004).

FN68. *Id.* at 246; *but see DeMarco v. Robertson Stephens*, 2005 WL 120233, at *7 (holding that the fraud on the market theory is applicable to material misstatements made by analysts).

***6** However, although the court found that the presumption did not apply in that case, it nonetheless "conclude[d] that the fraud-on-the-market doctrine may in certain conditions apply to analyst reports...." [FN69] Indeed, there is nothing in the language of *Basic* that suggests that the presumption should be limited to statements made by issuers themselves. [FN70] Rather, the fraud on the market presumption holds that "[b]ecause most publicly available information is reflected in market price, an investor's reliance on *any* public material misrepresentations, therefore, may be presumed for purposes of a Rule 10b-5 action." [FN71] Thus, the fraud on the market inquiry is dependent not on who *made* a misstatement, but whether the statement was *material.* [FN72] A blanket prohibition on applying the fraud on the

market presumption to analyst reports is thus inconsistent with the requirements of *Basic.*

FN69. *DeMarco v. Lehman Bros.*, 222 F.R.D. at 245.

FN70. *See DeMarco v. Robertson Stephens*, 2005 WL 120233, at *7 (noting that "[n]othing in the language of *Basic* limits its holding to issuer statements alone"); *but see Hevesi*, 366 F.3d at 77 ("Although the fraud-on-the-market doctrine clearly applies to statements made by *issuers*, as in *Basic*, we have never addressed whether it also applies to reports by *analysts."*) (emphasis in original).

FN71. *Basic*, 485 U.S. at 247 (emphasis added).

FN72. *See, e.g., DeMarco v. Robertson Stephens*, 2005 WL 120233, at *8 (holding that "the fraud-on-the-market theory must apply to any *material* false information" and that, "[w]hile not every opinion by every self-proclaimed analyst will be material, the significant role of respected analysts as intermediaries in investors' assessments of value, and the lengths to which some analysts have allegedly gone to disguise their true opinions of stocks they wish to promote, make clear that such opinions will sometimes be material") (emphasis in original).

Defendants argue, in the alternative, that "[e]ven if *Basic* were held to apply to analyst reports, Plaintiffs would not be entitled to the presumption because they have not demonstrated that the price of RSL was actually distorted by Defendants' analyst reports." [FN73] However, there is no requirement at the class certification stage that plaintiffs prove that they are entitled to damages; rather, plaintiffs must make "some showing" that the class comports with Rule 23. Nonetheless, defendants argue that plaintiffs must *first* prove that a "material misrepresentation actually distort[ed] the market price," and only *then* are they entitled to use the fraud on the market presumption to establish that they relied on that price. [FN74]

FN73. Def. Opp. at 18.

FN74. *Id. See also id.* ("This theory is available only if the plaintiff *actually* relied on a market price that was *actually* distorted by the defendant.") (emphasis in original).

I disagree. The question at the class certification stage is not whether plaintiffs will ultimately be able to prove that the price of securities was manipulated, but whether questions of transaction causation may be resolved on a common basis. Where a material misrepresentation is alleged to have affected the prices of securities traded on a efficient market, the fraud on the market doctrine is applicable, and plaintiffs' allegations of transaction causation rely on common proof. [FN75]

FN75. Defendants do not dispute that RSL was traded on an efficient market. Moreover, RSL shares "were traded on the NASDAQ National Market ... were traded at high volumes during the class period ... [and were] extensively followed by analysts and received extensive media attention." Pl. Mem. at 19 (citing *In re IPO*, 227 F.R.D. at 106 (analyzing market efficiency regarding securities with similar characteristics)).

Thus, defendants' argument that plaintiffs are not entitled to the presumption because they "have offered no evidence that Defendants' analyst reports actually distorted the market price of RSL throughout the class period" is unavailing. [FN76] The fraud on the market presumption is simply a "useful device[ ] for allocating the burdens of proof between parties;" [FN77] in the class certification context, it allows plaintiffs to prove reliance by proving "that the scheme as a whole artificially inflated prices." [FN78] Whether alleged misrepresentations *in fact* altered securities prices is a question of fact, not a Rule 23 inquiry. If, at a later stage of litigation, plaintiffs are unable to prove that the alleged misrepresentations were material, and hence that they did not affect securities prices, then the common question of transaction causation will be answered in the negative. If, on the other hand, plaintiffs successfully prove that the alleged fraud inflated securities prices, that common question will be answered in the affirmative. Accordingly, I find that plaintiffs may employ the fraud on the market presumption to prove transaction causation on a common basis.

FN76. Def. Opp. at 18. Indeed, plaintiffs have submitted some evidence that the alleged scheme affected stock prices. *See* Report of Paul J. Irvine ("Irvine Report"), Ex. D to Trinko Decl., at 47 (applying cumulative abnormal return methodology, *see infra* Part IV.B., to determine that several positive and negative announcements by defendants were associated with abnormal

movements in RSL share prices). Defendants challenge Dr. Irvine's findings, but class certification proceedings are not the proper time to argue the weight of the evidence.

FN77. *Basic,* 485 U.S. at 245.

FN78. *In re IPO,* 227 F.R.D at 106 n. 319.

b. The *Affiliated Ute* Presumption

***7** Under the *Affiliated Ute* presumption, "[i]n securities fraud claims, reliance is presumed when the claim rests on the omission of a material fact." [FN79] This presumption of reliance is not conclusive. [FN80] Rather, "once the plaintiff establishes the materiality of the omission ... the burden shifts to the defendant to establish ... that the plaintiff did not rely on the omission in making the investment decision." [FN81] To satisfy this burden, a defendant must prove "that 'even if the material facts had been disclosed, plaintiff's decision as to the transaction would not have been different from what it was.' " [FN82]

FN79. *In re Worldcom, Inc. Sec. Litig.,* 219 F.R.D. 267, 291 (S.D . N.Y.2003) (citing *Affiliated Ute,* 406 U.S. at 153-54). *Accord Castellano,* 257 F.3d at 186.

FN80. *See DuPont v. Brady,* 828 F.2d 75, 78 (2d Cir.1987).

FN81. *Id.* at 76.

FN82. *Id.* at 78 (quoting *Rochez Bros. v. Rhoades,* 491 F.2d 402, 410 (3d Cir.1974)).

Defendants assert that "the *Affiliated Ute* presumption of reliance applies only in cases that are premised entirely or primarily on omissions." [FN83] Defendants cite decisions of the Fifth, Ninth and Tenth Circuits for this proposition. [FN84] However, where plaintiffs' claims are based on a combination of omissions and misstatements, courts in this Circuit have acknowledged the applicability of the *Affiliated Ute* presumption. [FN85] Indeed, the theory behind the *Affiliated Ute* presumption--that, when material information is concealed, plaintiffs should only have to prove that "a reasonable investor might have considered the omitted facts important in the making of [her] investment decision" [FN86]--is not undermined simply because a defendant makes misstatements at the same time it omits material information. In this case, plaintiffs allege that defendants omitted their own *quid pro quo* arrangements in addition to deliberately misrepresenting their opinions. If plaintiffs prove that a reasonable investor might have considered the omitted facts material in making an investment decision, then plaintiffs may employ the *Affiliated Ute* presumption to establish reliance on a common basis with respect to the alleged omissions. [FN87]

FN83. Def. Opp. at 19.

FN84. *See id.* at 20 (citing *Joseph v. Wiles,* 223 F.3d 1155, 1162 (10th Cir.2000) (holding that a court must "analyze the complaint to determine whether the offenses it alleges can be characterized primarily as omissions or misrepresentations in order to determine whether the *Affiliated Ute* presumption should apply"); *Binder v. Gillespie,* 184 F.3d 1059, 1064 (9th Cir.1999) ("We agree with these circuits that the *Affiliated Ute* presumption should not be applied to cases that allege both misstatements and omissions unless the case can be characterized as one that primarily alleges omissions."); *Finkel v. Docutel/Olivetti Corp.,* 817 F.2d 356, 359 (5th Cir.1987) (asserting, before *Basic* was decided, that "[a] court must, therefore, analytically characterize a 10b-5 action as either primarily a nondisclosure case (which would make the [*Affiliated Ute*] presumption applicable), or a positive misrepresentation case")). Defendants also cite the Second Circuit's 1981 opinion in *Wilson v. Comtech Telecomms. Corp.,* 648 F.2d 88, 93 (2d Cir.1981), which opined that "[w]hat is important is to understand the rationale for a presumption of causation in fact in cases like *Affiliated Ute,* in which no positive statements exist: reliance as a practical matter is impossible to prove." *Wilson,* which preceded *Basic,* did not purport to limit *Affiliated Ute* to cases in which "no positive statements exist;" rather, it compared the factual situation of *Affiliated Ute* to the facts of *Wilson,* an appeal of judgment after trial in which the factual record showed that the plaintiff had not proved reliance on any alleged misstatements. Indeed, *Wilson* notes that "[t]o characterize this, for purposes of establishing reliance [under *Affiliated Ute*], as either an omission or a misrepresentation case is to beg the question." *Id.* at 93. Rather, in *Wilson,* plaintiff's theory of liability was based on defendant's alleged "duty to correct

[earnings] projections once new information made them inaccurate." *Id.*

FN85. *See, e.g., In re IPO,* 227 F.R.D. at 105; *In re WorldCom,* 219 F.R.D. at 291. The Second Circuit has repeatedly noted that *Basic* and *Affiliated Ute* are available when there are "unusual 'problems of proof," ' such as where "the integrity of the market is alleged to have been compromised" and "where total non-disclosure of material information was alleged." *Harsco Corp. v. Sequi,* 91 F.3d 337 (2d Cir.1996) (quoting *Feinman v. Dean Witter Reynolds,* 84 F.3d 539, 541-42 (2d Cir.1996)). The Second Circuit has never adopted an either/or requirement for applicability of the fraud on the market or *Affiliated Ute* presumptions.

FN86. *Affiliated Ute,* 406 U.S. at 153-54.

FN87. In any event, the fraud on the market and *Affiliated Ute* presumptions will likely be coextensive in this case. Both presumptions depend on whether the omitted information or the misstated information is material. If plaintiffs cannot establish that the misrepresentations were material, then neither presumption will save plaintiffs' claims; if, on the other hand, plaintiffs can prove that some, but not all, of the alleged omissions and misstatements were material, then the availability of both presumptions allows plaintiffs to be fairly compensated for each material misstatement and omission.

It can be argued that the *Affiliated Ute* presumption is simply the fraud on the market presumption applied to material omissions. Both presumptions depend on the materiality of the undisclosed or misstated information. [FN88] If reasonable investors might have considered a fact material in making investment decisions, then it stands to reason that such material facts, if known, would have affected the stock prices. Thus, an investor who buys artificially inflated shares relying on the market price to reflect all material information about a security is harmed whether the shares are inflated by misstatements or by omissions. In any event, plaintiffs may use either presumption to prove transaction causation on a common basis.

FN88. *See, e.g., Finkel,* 817 F.2d at 360 (noting that the fraud on the market presumption "constructs an environment which is hospitable to the reliance presumption of Affiliated Ute" and that the two presumptions "interact"); *see also Panzirer v. Wolf,* 663 F.2d 365, 368 (2d Cir.1981) (noting, before *Basic* approved the fraud on the market theory, that "[r]elying on Affiliated Ute, this and other circuits do not require direct reliance where the fraud affects the market, on the ground that an investor relies generally on the supposition that the market price is validly set and that no unsuspected fraud has affected the price."), *vacated as moot by Price Waterhouse v. Panzirer,* 459 U.S. 1027, 1027 (1982).

2. Loss Causation

In a securities fraud case based on misrepresentations or omissions, plaintiffs must prove that defendants' alleged wrongdoing concealed some risk from plaintiffs. [FN89] To prove loss causation, plaintiffs must then show "both that the loss [was] foreseeable *and* that the loss [was] caused by the materialization of the concealed risk." [FN90]

FN89. *See Lentell v. Merrill Lynch & Co., Inc.,* 396 F.3d 161, 173 (2d Cir.2005) (plaintiffs must allege "that the misstatement or omission concealed something from the market....").

FN90. *Id. See also In re IPO* (*"Liu v. CSFB"*), No. 21 MC 92, 2005 WL 1529659, at *5 (S.D.N.Y. June 28, 2005).

***8** Under Rule 23(b)(3), plaintiffs must make some showing that common questions will predominate over individual questions. Because individual adjudication of loss causation would cause individual issues to predominate, plaintiffs in securities fraud actions "must present a methodology for determining loss causation that may be commonly applied to all members of the class." [FN91] Plaintiffs may submit an expert report suggesting a methodology for determining such a link. [FN92] "A district court must ensure that the basis of [such an] expert opinion is not so flawed that it would be inadmissible as a matter of law." [FN93] At the class certification stage, the question "is whether plaintiffs' expert evidence is sufficient to demonstrate common questions of fact warranting certification of the proposed class, not whether the evidence will ultimately be persuasive;" a district court should therefore refrain from "weigh[ing] conflicting expert evidence or engag[ing] in 'statistical dueling' of experts." [FN94]

FN91. *In re IPO,* 227 F.R.D. at 111 (citing

VISA Check, 280 F . 3d at 134-35). *See also In re Sumitomo Copper Litig.*, 182 F.R.D. 85, 91 (S.D.N.Y.1998) (granting class certification upon finding that "plaintiffs' econometric methodologies have a reasonable probability of establishing" plaintiffs' claims by common proof). *But see Newton v. Merrill, Lynch, Pierce, Fenner & Smith, Inc.*, 259 F.3d 154, 189 (3d Cir.2001) (where determining the existence of loss would require individual analysis of each investor's trades, "[t]he individual questions ... are overpowering").

FN92. *See, e.g., VISA Check*, 280 F.3d at 134-35 (examining submission of expert report to show loss causation in the antitrust class action context); *In re IPO*, 227 F.R.D. at 111 (same, in securities fraud context).

FN93. *VISA Check*, 280 F.3d at 135.

FN94. *Id.* (citing *Caridad*, 191 F.3d at 292-93).

Plaintiffs have submitted the declaration of Dr. Paul J. Irvine, "an expert on security analysts and the markets," who has published and peer-reviewed several articles regarding securities analysts, in support of their contention that loss causation is susceptible to class-wide proof. [FN95] Defendants have countered with the report of Dr. John W. Peavy III, a professor of finance, financial consultant and investment advisor, [FN96] addressing the question of "whether Plaintiffs [and Dr. Irvine] have offered a scientific methodology that can be used to establish whether or not the Defendants' reports had at least some sustained impact on RSL's stock price throughout the Proposed Class Period." [FN97] Plaintiffs have also submitted a reply report by Dr. Irvine that responds to methodological criticisms levied by Dr. Peavy and demonstrates how losses could be calculated using the methodologies described in the Irvine Report. [FN98]

FN95. Irvine Report at 4.

FN96. *See* Expert Report of John W. Peavy III ("Peavy Report"), Ex. A to 3/14/05 Declaration of Stephanie G. Wheeler, counsel for defendants, at 3.

FN97. Peavy Report at 1.

FN98. *See* 4/27/05 Reply Report of Dr. Paul J. Irvine ("Irvine Reply Report"). The parties have disagreed regarding whether plaintiffs were permitted to submit the Irvine Report. *See* 6/10/05 Letter from Defendants to the Court (asserting that the Irvine Reply Report was not permitted under the parties' scheduling agreement and moving to strike, or in the alternative requesting leave to file a sur-reply); 6/15/05 Letter from Plaintiffs to the Court (showing that the Irvine Reply Report, though not explicitly authorized by the parties' agreement, was nonetheless contemplated by the parties and the Court). To the extent the Irvine Reply Report provides examples and demonstrates the robustness of the methodology proposed in the Irvine Report, it is permissible. However, to the extent that the Irvine Reply Report proposes new methodologies or quibbles with defendants' briefs and the methodology of defendants' expert report, *see, e.g.*, Irvine Reply Report at 14-15, 18, the Irvine Reply Report has been disregarded.

In my May 21, 2004 Opinion denying defendants' motions to dismiss, I summarized plaintiffs' loss causation allegations as follows: "the Banks, knowing that RSL was actually in decline, inflated the price of RSL shares and then worked doubly hard to conceal or obfuscate the meaning of every fact that would have revealed that decline to the investing public." [FN99] When facts contradicting defendants' reports became public, under plaintiffs' theory, some of the artificial inflation caused by defendants' reports would have dissipated; by contrast, when defendants issued fraudulent reports, the level of artificial inflation increased. [FN100] Thus, the allegedly concealed risk--*i.e.*, that RSL was failing--materialized as RSL declined, and plaintiffs' losses were caused when news of that decline caused the artificial inflation created by fraudulent analyst reports to dissipate.

FN99. *Fogarazzo*, 341 F.Supp.2d at 292.

FN100. *See* Irvine Report at 48.

The Irvine Report proposes two possible methods by which plaintiffs might prove loss causation on a common basis. The Irvine Report first suggests that price dissipation throughout the class period might be proved by providing *" 'first*, an analysis of the initial inflation caused by alleged [fraudulent reports]; and *second*, an analysis of the dissipation of that inflation over time." ' [FN101]

FN101. *See id.* at 46 (quoting *In re IPO*, 227 F.R.D. at 112).

***9** This methodology, approved in my October 13, 2004 Opinion granting class certification in six focus cases that are part of the *In re IPO* proceedings, is inapplicable to the present case. The alleged fraud in *In re IPO* involves a scheme of market manipulation through which customers purchasing securities in IPOs were required to commit to purchasing more shares in the aftermarket, increasing demand for shares and causing artificial inflation. [FN102] *In re IPO* is thus primarily a case about market manipulation, as opposed to misstatements and omissions. The mechanisms of loss causation differ:

> FN102. *See In re IPO,* 227 F.R.D. at 112 (noting that "[i]n a market manipulation case, plaintiffs can satisfy their burden by presenting a means to determine that the scheme caused an increase in price that dissipated throughout the class period.").

> Once a misstatement or omission infects the pool of available information, it continues to affect the stock price until contradictory information becomes available. The inflationary effect of misstatements or omissions, therefore, should be constant. Manipulative conduct is different. A market manipulation is a discrete act that influences stock price. Once the manipulation ceases, however, the information available to the market is the same as before, and the stock price gradually returns to its true value. [FN103]

> FN103. *In re IPO,* 297 F.Supp.2d 668, 674 (S.D.N.Y.2003) (citations omitted).

The instant case, unlike *In re IPO,* is premised on misrepresentations and omissions. Accordingly, plaintiffs may not avail themselves of the loss causation methodology used in *In re IPO;* rather, a valid loss causation methodology in this case must be able to analyze the inflationary effects of the alleged misrepresentations or omissions and the alleged corrective events. [FN104]

> FN104. *See In re IPO* (*"Liu v. CSFB"*), No. 21 MC 92, 2005 WL 1162445, at *3-4 (S.D.N.Y. May 16, 2005).

The Irvine Report also suggests an analysis that focuses on market price reactions to specific analyst recommendations:

> In addition, unlike the *IPO Securities Litigation* case, a more interesting estimation procedure is available. If the court accepts the Plaintiffs' demonstration that the Defendants' analysts' reports were successful in 'propping up' the price of the stock, then an estimate of the degree to which the Defendants were successful can be obtained by an analysis of the price reaction when the props were partially removed. [FN105]

> FN105. Irvine Report at 48.

The Irvine Report analyzes the price effects of several analyst reports through application of a "cumulative abnormal return" analysis. Essentially, Irvine's analysis takes a three-day snapshot of securities prices, including the day preceding an event, the day of the event itself, and the day after the event. This period of time is known as the "event window." [FN106] The return of the relevant security--*i.e.,* the change in price of that security during the event window--is calculated and compared to a "market benchmark." The market benchmark consists of the combined performances of several securities; in his report, Dr. Irvine compared RSL prices over each event window to three market benchmarks, including the overall performance of the S & P 500 Composite Index. The "cumulative abnormal return" is the amount by which the subject security's return differed from the return of the market benchmark over the event window. [FN107] For example, if, on the day of an event, the stock price of RSL opened at $10 and closed at $20, while the S & P 500 Composite Index opened at $10 and closed at $15, a 100% abnormal return is associated with the event. [FN108]

> FN106. Dr. Irvine notes that event windows need not be three days long. Event windows comprising only the day of the event, or the day of the event and the day immediately following the event, may also be used. The three-day event window technique used by Dr. Irvine, which extends the window to the day preceding the event, is able to incorporate returns that may be attributable to an event that is recorded on the event date, but actually occurred the day before the event date. Although Dr. Irvine notes that the three-day window is "very conservative," "reduces the statistical significance of the results" and "will less frequently report statistically significant results than ... event studies using only [the] event day," it is the technique "that is generally followed." Irvine Reply Report at 3.

> FN107. *See id.* at 2-3.

> FN108. The return of RSL in this

hypothetical is twice as much, or 100% more, than the return of the market benchmark.

***10** The Irvine Report asserts that "[t]he market responses to analysts' recommendations for RSL indicate an unusually large reliance of the market on the recommendations of Defendants' analysts." [FN109] For example, "[o]n March 28, 2000, Morgan Stanley issued [a] Strong Buy recommendation and the stock responded with a 13.5% 3-day abnormal return." [FN110] By contrast "on October 6, 2000, Morgan downgraded the stock to a Hold recommendation. The market responded negatively to the news[,] falling by 22.3%." [FN111]

FN109. Irvine Report at 47.

FN110. *Id.* It is somewhat unclear from this statement whether Dr. Irvine meant that RSL did 22.3% *worse* than the market benchmark, or whether the stock price simply fell 22.3%. However, Dr. Irvine's inclusion of this statement in a section describing "[e]vidence ... from an analysis of the abnormal returns surrounding the release of these reports" implies that 22.3% refers to the abnormal return associated with Morgan's downgrading. *Id.*

FN111. *Id.*

The Peavy Report criticizes Dr. Irvine's proposed methodology, asserting that accurate price impact "cannot be scientifically determined in the presence of confounding events." [FN112] The thrust of Dr. Peavy's argument is that "confounding events"--*i .e.,* events separate from defendants' analyst reports that may have affected RSL prices--mask the effects of the alleged misrepresentations. Such confounding events include, *inter alia,* earnings reports issued by RSL, announcements of new mergers, acquisitions and joint ventures involving RSL, and announcements of new RSL products. [FN113]

FN112. Peavy Report at 7.

FN113. *See id.* at 10.

However, class certification is not the time to wage a battle of the experts; nor is it a time to engage in the weighing of contradictory facts. [FN114] Defendants will have the opportunity to present their own analyses of the effects of the alleged misrepresentations, which may include alternative theories as to exactly what caused the price effects cited by Dr. Irvine. Dr. Irvine's analysis of the cumulative abnormal returns associated with events in defendants' analyst coverage of RSL provides a satisfactory methodology for determining loss causation on a common basis. Indeed, defendants' arguments that confounding events are responsible for the price changes in RSL shares, or make it impossible to quantify the precise impact of the alleged fraud, are arguments that address the weight of plaintiffs' common evidence. If plaintiffs cannot ultimately prove that the alleged fraud artificially inflated RSL's stock prices, then they will fail on a *common* basis. At the class certification stage, plaintiffs need only show that their claims are susceptible to common proof. Plaintiffs have done so with respect to loss causation.

FN114. *See In re IPO,* 227 F.R.D. at 111.

C. Superiority

Rule 23 suggests a number of nonexclusive factors the trial judge can weigh to determine superiority, including "the interest of members of the class in individually controlling the prosecution." [FN115] Where thousands of potential claimants assert claims based on predominantly common issues, though, "a class member's interest in *aggregating* the claims substantially outweighs her interest in individual control of the litigation." [FN116] Adjudicating the claims of class members in this case as individual claims would waste substantial judicial resources. In addition, because many of the members of the proposed class may not have invested heavily in RSL securities, litigating an individual case would likely cost far more than the potential recovery. Moreover, because there will likely be no difficulty in ascertaining the membership of the class, and because common questions predominate over individual questions. I find that the class form is superior to any alternative method of adjudication in this case.

FN115. Fed.R.Civ.P. 23(b)(3)(A).

FN116. *In re IPO,* 227 F.R.D. at 121.

V. CONCLUSION

***11** Plaintiffs' motion is granted. The proposed class, which includes "all persons who purchased or otherwise acquired shares of RSL equities during the period from April 30, 1999 through December 29, 2000, both dates inclusive," is hereby certified. Lawrence Fogarazzo, Carolyn Fogarazzo, Stephen L. Hopkins and Don Engel are appointed class representatives, and the Law Offices of Curtis V.

Trinko, LLP is appointed Class Counsel. A conference is scheduled for 5:00 P.M. on August 4, 2005, in Courtroom 15C.

SO ORDERED:

S.D.N.Y.,2005.

Fogarazzao v. Lehman Bros., Inc.

Slip Copy, 2005 WL 1802851 (S.D.N.Y.)

END OF DOCUMENT

Not Reported in F.Supp.2d
Not Reported in F.Supp.2d, 2003 WL 402565 (S.D.N.Y.)
(Cite as: 2003 WL 402565 (S.D.N.Y.))

Motions, Pleadings and Filings

Only the Westlaw citation is currently available.

United States District Court,
S.D. New York.
Adam INGLES et al., Plaintiffs,
v.
THE CITY OF NEW YORK et al., Defendants.
No. 01 Civ. 8279(DC).

Feb. 20, 2003.

Current and former inmates brought action charging city prison officials with engaging in pattern and practice of excessive force. On inmates motion for certification of plaintiff class, the District Court, Chin, J., held that: (1) proposed class was sufficiently definite; (2) lead plaintiffs were adequate class representatives, and (3) prosecution of separate actions risked inconsistent judgments.

Motion granted.

West Headnotes

[1] Federal Civil Procedure k186.10
170Ak186.10
Proposed class consisting of all prisoners who were or would be confined in New York City Department of Correction institutions and commands which were not already subject to court order based on prior use of excessive force litigation was sufficiently definite; although there was dispute as to extent to which prior orders had been implemented, it was clear which facilities were covered. Fed.Rules Civ.Proc.Rule 23(a), 28 U.S.C.A.

[2] Federal Civil Procedure k186.10
170Ak186.10
Proposed class consisting of all prisoners who were or would be confined in New York City Department of Correction institutions and commands which were not already subject to court order based on prior use of excessive force litigation satisfied numerosity requirement for class certification; because proposed class would consist of prisoners of some twelve detention facilities throughout city, joinder was impracticable. Fed.Rules Civ.Proc.Rule 23(a)(1), 28 U.S.C.A.

[3] Federal Civil Procedure k186.10
170Ak186.10
Lead plaintiffs, in class action suit seeking injunction against use of excessive force in New York City Department of Correction institutions, were adequate class representatives, even though they were also asserting individual claims for damages, one lead plaintiff had psychiatric condition and another was being confined in punitive segregation; all plaintiffs' claims rested on same theory of liability and lead plaintiffs stood to benefit from any injunctive relief obtained. Fed.Rules Civ.Proc.Rule 23(a)(4), 28 U.S.C.A.

[4] Federal Civil Procedure k186.10
170Ak186.10
Certification of plaintiff class, in prisoner suit seeking injunction against use of excessive force in New York City Department of Correction institutions, was warranted; prosecution of separate actions risked inconsistent judgments, and injunctive relief being sought would benefit entire class. Fed.Rules Civ.Proc.Rule 23(b)(1, 2), 28 U.S.C.A.

The Legal Aid Society, Prisoners' Rights Project, By: John Boston, Jonathan Chasan, Mary Lynne Werlwas, Madeline DeLone, Brooklyn, NY-- and--Sullivan & Cromwell LLP, By: Penny Shane, Stacy Stoller, J. Andrew Kent, New York, NY--and--Emery Cuti Brinckerhoff & Abady, By: Jonathan Abady, Ilann M. Maazel, New York, NY, for Plaintiffs.

Michael A. Cardozo, Corporation Counsel of the City of New York, By: Stacy Laine Matthews, Susan Scharfstein, John Graziadei, New York, NY, for Defendants.

MEMORANDUM DECISION

CHIN, J.

***1** In this prisoners' rights case, plaintiffs allege that defendants, the New York City Department of Correction ("DOC") and certain of its employees, engaged in a pattern and practice of excessive force in violation of the Eighth and Fourteenth Amendments to the United States Constitution and the laws and

Constitution of the State of New York. The named plaintiffs are inmates at several DOC detention facilities. They seek money damages and injunctive and declaratory relief.

In four class actions over the past fifteen years, federal courts have approved remedial orders governing the use of force at certain DOC facilities. [FN1] Plaintiffs in this case move pursuant to Fed.R.Civ.P. 23 for an order certifying a class consisting of present and future DOC inmates to seek redress for similar alleged violations at the remaining DOC locations.

> FN1. *See Sheppard v. Phoenix,* No. 91 Civ. 4148(RPP), 2002 WL 1603138, at *10 (S.D.N.Y. July 18, 2002) (Central Punitive Segregation Unit); *Jackson v. Montemagno,* No. 85. Civ. 2384(AS) (E.D.N.Y.1991) (Order Approving Stipulation for Entry of Judgment, November 26, 1991) (Brooklyn House of Detention); *Reynolds v. Ward,* No. 81 Civ. 101(PNL) (S.D.N.Y.1990) (Order and Consent Judgment ¶¶ 42-48, October 1, 1990) (Bellevue Prison Psychiatric Ward); *Fisher v. Koehler,* 718 F.Supp. 1111 (S.D.N.Y.1989) (Correctional Institute for Men).

For the reasons set forth below, plaintiffs' motion is granted.

STATEMENT OF THE CASE

A. *Summary of the Facts*

DOC operates institutions on Rikers Island and in Manhattan, Queens, and the Bronx that are not currently subject to court order resulting from litigation of excessive force claims against DOC staff. [FN2] (Am.Compl.¶ 2). The individual defendants include the uniformed staff, supervisory staff, and wardens of the several DOC institutions alleged to be engaged in a pattern and practice of excessive force against plaintiffs and other inmates. (*Id.* ¶¶ 6- 17).

> FN2. According to plaintiffs, the facilities and commands that are not subject to ongoing injunctive orders are the Adolescent Reception and Detention Center ("ARDC"), Anna M. Kross Center ("AMKC"), George Motchan Detention Center ("GMDC"), George R. Vierno Center ("GRVC"), Manhattan Detention Complex ("MDC"), North Infirmary Command ("NIC"), Otis Bantum Correctional Center ("OBCC"), Rose M. Singer Center ("RMSC"), West Facility, Bronx House of Detention ("BxHDM"), Queens House of Detention ("QHDM"), Transportation Division, Emergency Services Unit ("ESU") and Vernon C. Bain Correctional Facility ("VCBC" or "the Barge"). (Am.Compl.¶ 18).

Plaintiffs allege that they have suffered unjustified beatings at the hands of DOC personnel, as punishment for minor misconduct, verbal complaints, protests, or perceived disrespect. (*Id.* ¶ 19). They allege that DOC personnel routinely falsify documents and fabricate claims of provocation to cover up the assaults. (*Id.* ¶ 22). Plaintiffs contend that defendants have either ordered, participated in, or acted in complicity with or acquiescence towards this pattern of force, and that DOC training procedures establish a system-wide policy of excessive force.

B. *Plaintiffs*

Plaintiffs are twenty-two present and former DOC inmates who allege that they have suffered physical injury as a result of defendants' use of excessive force while in DOC custody. Lead plaintiffs Shawn Davis, Ed Sykes, Paul Person, Lamont Bradley, and Al Smith seek to represent the proposed class. [FN3]

> FN3. Plaintiffs added Al Smith as a proposed class representative after the motion for class certification was filed. (Supplemental Decl. in Supp. of Motion to Amend Compl., August 9, 2002).

For the purposes of this motion, I accept plaintiffs' allegations as true. *See Eisen v. Carlisle & Jacquelin,* 417 U.S. 156, 177, 94 S.Ct. 2140, 40 L.Ed.2d 732 (1974); *Baffa v. Donaldson, Lufkin & Jenrette Secs. Corp.,* 222 F.3d 52, 58 (2d Cir.2000). The allegations as to the lead plaintiffs are summarized as follows:

1. *Shawn Davis*

On or about May 28, 2002, Davis returned from a court appearance in the Bronx to pre-trial detention at AMKC. Upon arriving, he asked an officer if he could receive his psychiatric medication for that day. The officer informed Davis that she could not deal with his problem. Davis complained to a captain, but received no response. (Am.Compl.¶¶ 57-58).

***2** Davis became angry and threw a plastic chair. Three correction officers then punched him, handcuffed his arms behind his back, and escorted him outside the area where another officer hit him in the stomach with a baton. Afterwards, Davis was placed alone in a cell,

where four of the officers struck Davis numerous times in the face and body, causing him to fall to the floor. One officer kicked him in the left eye, causing his eyeball to rupture. (*Id.* ¶¶ 58-60). Davis alleges that he was beaten by eight officers in total.

Davis alleges that as a result of this assault he sustained severe emotional and physical injuries, including impaired vision in his left eye. (*Id.* ¶ 61).

2. *Ed Sykes*

On or about March 28, 2002, Sykes was housed in pre-trial detention in a punitive segregation area of GRVC, where he remained in his cell for 23 hours a day. The water in his cell had been turned off for two days, preventing him from flushing the toilet or washing himself. When Officer Hershaway served Sykes a meal through the food slot in his cell, Sykes held the slot open and asked for his water to be restored. Hershaway slammed the slot down on Sykes's arm, telling him that Ramos, the area captain, did not want Sykes's water turned on. Sykes then requested to go to the jail clinic. (*Id.* ¶ 64).

Defendants Hershaway, Ramos, Dice, Lewis and Yates entered the cell and handcuffed Sykes. Ramos asked Sykes if he really wanted to go to the clinic. When Sykes answered affirmatively, Ramos told Dice to "talk to him" and left the cell. Dice told Sykes that he could go to the clinic only if he was injured. Hershaway and Dice then struck Sykes in the face and body in the presence of Lewis and Yates. Dice emptied a bucket of water on Sykes, telling him that he was injured by falling in water in his flooded cell. On the way to the clinic, Dice pushed Sykes's head into a wall and slammed his face into a glass partition, gashing open his nose. Sykes's nose was sutured at the clinic, and X-rays confirmed fractures of his nose and wrist. (*Id.* ¶¶ 65-67).

An injury to inmate report prepared by Ramos, or at his direction, claimed that Sykes's injuries occurred when he slipped and fell upon leaving his cell and when he ran into the clinic door. Sykes alleges that he has sustained emotional and physical injuries, including extensive facial scars, as a result of the assault. (*Id.* ¶¶ 68-69).

3. *Al Smith*

Following a hearing on his parole status on or about February 13, 2001, Smith was being kept in a holding pen along with other inmates at the Rikers Island Judicial Center. Some other inmates repeatedly kicked the door of the pen. Officer Givens entered the doorway and told Smith to come out, but Smith refused because he was fearful that he would be assaulted and falsely accused of kicking the door. Officers Givens, McConnon, and Doe 13 entered the pen and took Smith to a hallway, where they set him on the floor. They were joined in the hallway by Officer McKeller and Captain Cardo. Givens punched him in the eye while the remaining defendants struck him several times in the back, side, and head. (*Id.* ¶ 80).

***3** Afterwards, Smith was taken to an empty holding pen. He asked an officer to see a doctor, but the officer cursed at him and advised him that he was lucky to be alive. (*Id.* ¶ 81). Thereafter, Smith was taken to a clinic and treated for a possible fracture to his right orbital rim and contusions, hemorrhaging, and lacerations to his face. (*Id.* ¶ 82).

Smith alleges that he suffered severe emotional and physical injuries, including back pain, bleeding from his left outer ear and blurred vision, as a result of the assault. (*Id.*).

4. *Paul Person*

While in pre-trial detention at GRVC on or about May 2, 2000, Person was confronted in a hallway by Officers Swetokas and Mastroainni. One of them held Person while the other punched him in the nose. Additional officers arrived. While Person was handcuffed, one of the defendants kicked him in the mouth. Daniels, a captain, witnessed the assault but took no steps to protect Person. Person alleges that Swetokas and Mastroainni were angry with him for arguing with them the previous evening, and because he observed them being chastised by a captain. (*Id.* ¶¶ 140-41, 143).

At the clinic, Person was treated for a nasal fracture, lip lacerations, back strain, and lumbar and wrist contusions. Thereafter, Person was administratively charged, and found guilty of assaulting staff. He also pled guilty to a criminal charge of harassment in the second degree. He asserts that these charges were fabricated. Person alleges that he suffered severe physical and emotional injuries as a result of the assault. (*Id.* ¶¶ 142-43).

5. *Lamont Bradley*

On or about December 5, 2001, Bradley was in pre-trial detention at GRVC, awaiting an escort officer to accompany him to the visiting room. Bradley asked Officer Chapman to expedite his escort. Half an hour later, Chapman released Bradley from his cell, and

Officer R. Jackson cuffed his hands behind his back. Officer K. Jackson cursed at Bradley and punched him in the mouth, causing him to fall to one knee, and then kicked him in the back and face. While this was happening, Officers Chapman and R. Jackson observed but took no steps to protect Bradley. (*Id.* ¶¶ 171-72).

At the clinic, Bradley was treated for a large bruise and swelling to the back of his head, a contusion and swelling of the left upper eyelid, tenderness to the cheek, and three discrete lacerations to his lower lip, which were sutured. As a result of the assault, he was unable to enter the visit area. GRVC supervisor Captain Hernandez advised Bradley to tell his family that he had injured his face "playing ball." (*Id.* ¶ 173).

C. *Prior Proceedings*

This case was filed on September 5, 2001 by Adam Ingles *pro se.* Ingles thereafter obtained counsel. On July 19, 2002, he filed a motion to amend the complaint, which defendants did not oppose. On July 31, 2002, plaintiffs filed this motion for class certification. On September 6, 2002, Ingles filed an amended complaint adding twenty-one additional plaintiffs and asserting class allegations.

DISCUSSION

A. *Class Certification*

***4** In moving for class certification, plaintiffs must first demonstrate that all the requirements of Fed.R.Civ.P. 23(a) have been satisfied. *See In re VISA Check/Mastermoney Antitrust Litig.*, 280 F.3d 124, 132-33 (2d Cir.2001); *Caridad v. Metro-North Commuter R.R.*, 191 F.3d 283, 291 (2d Cir.1999). Second, plaintiffs must show that the putative class falls within one of the three categories set forth in Rule 23(b). *In re VISA Check/Mastermoney*, 280 F.3d at 133. Plaintiffs here seek certification under Rules 23(b)(1)(A), 23(b)(1)(B), and 23(b)(2).

Although a court must conduct a rigorous inquiry to determine whether the requirements of Rule 23 have been satisfied, *see Gen. Tel. Co. of Southwest v. Falcon*, 457 U.S. 147, 161, 102 S.Ct. 2364, 72 L.Ed.2d 740 (1982), it must accept plaintiffs' allegations as true and refrain from conducting an examination of the merits when determining the propriety of class certification. *See Eisen*, 417 U.S. at 178; *Baffa*, 222 F.3d at 58. Furthermore, because courts are given discretion to tailor the scope of the class later in the litigation, the requirements for class certification are liberally construed in the early stages of a case. *See Woe ex rel. Woe v.. Cuomo*, 729 F.2d 96, 107 (2d Cir.), *cert. denied*, 469 U.S. 936, 105 S.Ct. 339, 83 L.Ed.2d 274 (1984); *Doe v. Karadzic*, 192 F.R.D. 133, 136 (S.D.N.Y.2000) (citing cases); *see also Weigmann v. Glorious Food, Inc.*, 169 F.R.D. 280, 284 (S.D.N.Y.1996).

I first address defendants' contention that plaintiffs' proposed class definition is insufficiently definite. Next I consider whether plaintiffs have satisfied the criteria for certification set forth by Rule 23(a). Finally, I decide whether the putative class falls within any of the categories set forth in Rule 23(b).

B. *Class Definition*

[1] A class is sufficiently definite if "it is administratively feasible for the court to determine whether an individual is a member." 7A C. Wright et al., *Federal Practice & Procedure* § 1760 (2d ed.1986). Here, plaintiffs propose a class consisting of all prisoners who are or will be confined in DOC institutions and commands not already subject to court order based on prior use of force litigation.

Defendants contend that plaintiffs' class definition is inadequate because plaintiffs fail to say what remedial measures in the prior cases were not implemented department-wide. The parties dispute whether DOC has refused to implement court-ordered remedies throughout its jail facilities. For the purposes of class certification, however, plaintiffs have clearly identified the DOC facilities covered by consent orders entered in the prior actions, and those facilities which it believes are not covered. Hence, I find the proposed class to be sufficiently definite.

C. *Rule 23(a)*

Rule 23(a) provides that:

> One or more members of a class may sue or be sued as representative parties on behalf of all only if (1) the class is so numerous that joinder of all members is impracticable, (2) there are questions of law or fact common to the class, (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class, and (4) the representative parties will fairly and adequately protect the interests of the class.

***5** Fed.R.Civ.P. 23(a).

1. *Numerosity*

[2] Under Rule 23(a)(1), the class must be "so numerous that joinder of all members is impracticable." Fed.R.Civ.P. 23(a)(1); *see Amchem Prods., Inc. v.*

Windsor, 521 U.S. 591, 607 n. 8, 117 S.Ct. 2231, 138 L.Ed.2d 689 (1997); *Marisol A. v. Giuliani*, 126 F.3d 372, 376 (2d Cir.1997) (per curiam). Defendants concede that the numerosity requirement is met. As the putative class members would consist of prisoners of some twelve detention facilities throughout New York City, joinder is impracticable and I conclude that the numerosity requirement is satisfied.

2. *Commonality*

Under Rule 23(a)(2), there must be questions of law or fact common to the class. Fed.R.Civ.P. 23(a)(2); *see Robinson v. Metro-North Commuter R.R.*, 267 F.3d 147, 155 (2d Cir.2001) (" 'The commonality requirement is met if plaintiffs' grievances share a common question of law or of fact." ' (quoting *Marisol A.*, 126 F.3d at 376)). Here, defendants do not dispute that the commonality requirement is satisfied, and indeed plaintiffs' allegations present common questions of law and fact.

3. *Typicality*

Rule 23(a)(3) requires that "the claims or defenses of the representative parties [be] typical of the claims or defenses of the class." Fed.R.Civ.P. 23(a)(3); *see Amchem*, 521 U.S. at 607 n. 11. Typicality "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." *Robinson*, 267 F.3d at 155 (internal quotation omitted). The purpose of Rule 23(a)(3) "is to ensure that 'maintenance of a class action is economical and that the named plaintiff's claims and the class claims are so interrelated [that] the interests of the class members will be fairly and adequately protected in their absence." ' *Cromer Finance Ltd. v. Berger*, 205 F.R.D. 113, 122 (S.D.N.Y.2001) (quoting *Falcon*, 457 U.S. at 158 n. 13); *see Marisol A. v. Giuliani*, 929 F.Supp. 662, 691 (S.D.N.Y.1996) (citing *Baby Neal ex rel. Kanter v. Casey*, 43 F.3d 48, 57 (3d Cir.1994)), *aff'd*, 126 F.3d 372 (2d Cir.1997).

There is no requirement that "the factual background of each named plaintiff's claim be identical to that of all class members." *Caridad*, 191 F.3d at 293; *see Cromer*, 205 F.R.D. at 122. Rather, typicality "requires that the disputed issue of law or fact occupy essentially the same degree of centrality to the named plaintiff's claim as to that of other members of the proposed class." *Caridad*, 191 F.3d at 293 (internal quotations omitted). Defendants do not oppose certification on this basis, and plaintiffs present claims grounded in the same legal arguments and arising from sufficiently similar events to satisfy the requirement.

4. *Adequacy of Representation*

[3] To determine whether the requirement of adequacy has been satisfied, courts must look to whether "the representative parties will fairly and adequately protect the interests of the class." Fed.R.Civ.P. 23(a)(4). To establish adequacy of representation, plaintiffs must show that (1) plaintiffs' counsel are competent to handle the case and (2) there are no conflicts of interest among class members. *Baffa*, 222 F.3d at 60; *Cromer*, 205 F.R.D. at 123.

***6** Evidence that relates to the requirements of typicality and commonality can reflect on the adequacy of representation requirement. *Amchem*, 521 U.S. at 626 n. 20 (citing *Falcon*, 457 U.S. at 158 n. 13); *Marisol A.*, 126 F.3d at 378. "[A] class representative must be part of the class and 'possess the same interest and suffer the same injury' as the class members." *Amchem*, 521 U.S. at 625-26 (quoting *East Tex. Motor Freight Sys., Inc. v. Rodriguez*, 431 U.S. 395, 403, 97 S.Ct. 1891, 52 L.Ed.2d 453 (1977) (citation omitted)).

Defendants do not challenge the competency of counsel; hence I will address only defendants' challenges to the named plaintiffs as adequate representatives. Defendants assert that the proposed class representatives are inadequate because a conflict of interest exists between their individual claims for damages and their class claims for institutional reform. Defendants also assert that plaintiffs Sykes, Davis, and Daniels lack the necessary personal qualities to adequately represent the class. I address each contention in turn.

a. *Conflict of Interest*

Defendants contend that the proposed class representatives do not fairly and adequately represent the class because they seek individual damages along with class-wide injunctive relief, resulting in a conflict of interest between themselves and the class. Specifically, defendants contend that plaintiffs have an incentive to settle on terms "favor[ing] their damages claims over class-wide institutional claims." (Def. Opp. at 11). This argument is rejected for several reasons. First, regardless of the relief sought, the proposed lead plaintiffs' claims rest on the same theory of liability as do the claims of other class members. Second, lead plaintiffs are incarcerated at facilities operated by the defendants, and thus they will benefit from injunctive relief as well. Third, any settlement must be approved by the Court. Fourth, to the extent any conflicts do

arise, I can adjust the definition of the class at that time.

b. *Credibility*

Defendants assert that plaintiffs Davis and Sykes lack the credibility, competence, and familiarity with the claims or underlying facts required to competently interact with counsel and direct the litigation on behalf of the class. [FN4] This argument is rejected.

> FN4. Defendants also contend that Calvin Daniels lacks credibility, and that this illustrates the need to examine the credibility of the proposed lead plaintiffs. (Def. Mem. at 14). As Daniels is not a proposed lead plaintiff, the Court does not address this argument.

To determine whether plaintiffs are adequate class representatives,

> courts have looked to factors such as their honesty, conscientiousness, and other affirmative personal qualities. If the representative displays a lack of credibility regarding the allegations [being] made or a lack of knowledge or understanding concerning what the suit is about, then the court may conclude that Rule 23(a)(4) is not satisfied.

Jane B. by Martin v. N.Y.C. Dept. of Social Services, 117 F.R.D. 64, 70- 71 (S.D.N.Y.1987) (quoting 7A C. Wright et al, *supra*, § 1766 at 308-310). Courts are reluctant, however, to deny class certification based on allegations of immorality or improper conduct not "arising out of or touching upon the very prosecution of the lawsuit." *Jane B.* at 71. As the court in *Jane B.* stated,

> ***7** If the courts prevent persons with questionable moral characters from acting as class representatives, prisoners, mental patients, juvenile offenders or others capable of socially deviant behavior could never have an adequate representative and thus could never be certified.

Id. I reject defendants' contentions that plaintiffs Davis and Sykes are not adequate representatives. Davis's psychiatric condition does not render him unable to represent the class; nor does Sykes's confinement in punitive segregation disqualify him. *See Daniels v. City of New York*, 198 F.R.D. 409, 418-19 (S.D.N.Y.2001) (holding that one plaintiff's lack of mental competence and another's outstanding warrant for public consumption of alcohol were "minor infirmities" that did not disqualify them from acting as class representatives).

Hence, I hold that plaintiffs have satisfied the requirements of Rule 23(a).

D. *Rule 23(b)*

[4] I now consider whether the class falls within one of the categories set forth in Rule 23(b). For the reasons set forth below, I hold that plaintiffs' proposed class qualifies under Rules 23(b)(1)(A), 23(b)(1)(B), and 23(b)(2).

1. *Rule 23(b)(1)(A)*

Plaintiffs seek class certification under Rule 23(b)(1)(A), which authorizes a class action if "the prosecution of separate actions by ... individual members of the class would create a risk of ... inconsistent or varying adjudications with respect to individual members of the class." Fed.R.Civ.P. 23(b)(1)(A). Defendants contend that because Rule 23(b)(1)(A) was designed to protect their interests, and they are willing to risk incompatible judgments resulting from individual claims, it is not available to plaintiffs.

Although some courts interpret Rule 23(b)(1)(A) as protecting defendants only, clearly all litigants as well as the courts benefit from consistency in the adjudication of claims of individual class members. [FN5] Here, consistency in the adjudication of these claims is important. Hence, defendants' objection on this basis is overruled and I conclude that plaintiffs qualify for class certification under Rule 23(b)(1)(A).

> FN5. *Compare Pettco Enterprises, Inc. v. White*, 162 F.R.D. 151, 155 (M.D.Ala.1995), *and Pruitt v. Allied Chemical Corp.*, 85 F.R.D. 100, 106-07 (E.D.Va.1980) (also noting that plaintiffs were primarily seeking monetary damages), *and Alsup v. Montgomery Ward & Co.*, 57 F.R.D. 89, 92 (N.D.Cal.1972) (also noting that "there is no danger that the defendant will be faced with incompatible standards of conduct and ... such risks are imaginary") *with Hernandez v. M/V Skyward*, 61 F.R.D. 558 (S.D.Fla.1973) (certifying mass tort class action under Rule 23(b)(1)(A) despite defendants' objection, on grounds that denial would result in separate actions and would create the risk of inconsistent adjudications). Although the Second Circuit has not ruled on whether Rule 23(b)(1)(A) remains available where defendants refuse its protection, Professor Newberg persuasively argues that "the needs of the judicial system to avoid inconsistent adjudications in a single controversy must be respected, despite the willingness of a litigant to assume the risk."

Herbert B. Newberg & Alba Conte, 1 *Newberg on Class Actions* § 4.07 (3d ed.1992).

2. *Rule 23(b)(1)(B)*

Plaintiffs also seek certification under Rule 23(b)(1)(B), which applies where "adjudications with respect to individual members of the class ... would as a practical matter be dispositive of the interests of the other members not parties to the adjudications." Fed.R.Civ.P. 23(b)(1)(B). Defendants contend that (1) plaintiffs fail to demonstrate how individual actions by class members would alter the rights of other class members, and (2) plaintiffs cannot avail themselves of this subsection because the claims do not involve a limited fund that may be exhausted by individual claims. For the following reasons, I reject both contentions.

First, plaintiffs' allegations clearly illustrate that an individual adjudication would affect the interests of other putative class members. Should I grant--or deny--injunctive relief against the use of excessive force, the rights of absent class members would be determined. The question whether defendants' use of force is constitutional may be dispositive of the claims of other class members.

***8** Second, defendants' contention that Rule 23(b)(1)(B) applies only in "limited fund" situations where "claims are made by numerous persons against a fund insufficient to satisfy all claims" is incorrect. *Karadzic,* 192 F.R.D. at 139. Although the limited fund scenario is the "paradigm suit" under Rule 23(b)(1)(B), courts have also granted certification under this subsection to classes of inmates seeking injunctive relief. *See, e.g., Caroline C. by and through Carter v. Johnson,* 174 F.R.D. 452, 467 (D.Neb.1996); *Coleman v. Wilson,* 912 F.Supp. 1282, 1293 (E.D.Cal.1995); *Gesicki v. Oswald,* 336 F.Supp. 371, 374 (S.D.N.Y.1971). Plaintiffs may maintain a class under Rule 23(b)(1)(B).

3. *Rule 23(b)(2)*

Finally, plaintiffs assert that their class should be certified under Rule 23(b)(2), which provides for certification if:

> 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).

Rule 23(b)(2) was intended to assist litigants seeking wide-spread institutional reform through injunctive and/or declaratory relief. *See Marisol A.,* 929 F.Supp. at 692 (citing *Baby Neal,* 43 F.3d at 58-59). In fact, several courts have found that Rule 23(b)(2) will generally be satisfied in cases where injunctive relief is sought and would benefit the entire class. *See e.g., Boucher,* 1996 WL 328441, at *3; *Brown v. Guiliani,* 158 F.R.D. 251, 269 (E.D.N.Y.1994); *Non-Traditional Employment for Women v. Tishman Realty and Const. Corp.,* 1989 WL 101940, at *4 ("Since defendants have allegedly acted 'on grounds generally applicable to the class' and the court finds injunctive relief appropriate should plaintiffs prevail on their claims, plaintiffs have satisfied Rule 23(b)(2)."); *Jane B.,* 117 F.R.D. at 71.

Defendants contend that because the named plaintiffs allege only isolated past instances of excessive force by DOC officers, under *Los Angeles v. Lyons,* 461 U.S. 95, 103, 103 S.Ct. 1660, 75 L.Ed.2d 675 (1983), they lack standing to pursue claims for injunctive relief. The argument is rejected, for *Lyons* is distinguishable.

In *Lyons,* the plaintiff had been placed in a chokehold by Los Angeles police officers without justification after being stopped for a minor traffic violation. He sought an injunction prohibiting Los Angeles police officers from using chokeholds, alleging that the City of Los Angeles authorized them to routinely apply chokeholds "in innumerable situations where they are not threatened by the use of any deadly force whatsoever." *Lyons,* 461 U.S. at 103. The Court held that Lyons lacked standing to seek injunctive relief because his assertion that he would be subject to a chokehold in the future was speculative. *Id.* at 107-08.

The Court found that Lyons would have to disobey the law to have contact with Los Angeles police officers again. In accordance with the assumption that individuals will conduct their activities within the law, the Court found that the likelihood that Lyons would again suffer an unjustified chokehold at the hands of Los Angeles police was too remote. *Id.* at 103 (citing *O'Shea v. Littleton,* 414 U.S. 488, 497, 94 S.Ct. 669, 38 L.Ed.2d 674 (1974)). In other words, Lyons was no more likely than any other citizen of Los Angeles to be subjected to a chokehold in the future. *Id.* at 108.

***9** For the following reasons, *Lyons* is different from this case. First, plaintiffs have alleged much more than an isolated instance of abuse by one or two DOC officers. Plaintiffs' amended complaint alleges supervisory complicity or acquiescence in abuse committed by officers and efforts by DOC personnel to cover up unprovoked assaults. Plaintiffs contend that a

policy of excessive force existed at DOC facilities, and that inmates will suffer irreparable harm as so long as the policy exists. *See Nat'l Cong. for Puerto Rican Rights v. City of New York,* 75 F.Supp.2d 154, 162 (S.D.N.Y.1999) (distinguishing *Lyons* where several plaintiffs presented colorable allegations of numerous constitutional violations demonstrating the allegedly unconstitutional practices of police officers). At this stage in the litigation, that is enough to confer standing.

Second, where Lyons was a member of the public, the instant plaintiffs are prisoners subject to the continual control of DOC staff. *See Williams v. Wilkinson,* 132 F.Supp.2d 601, 606 (S.D.Ohio 2001) (holding *Lyons* inapplicable to prison discipline case because the prisoner "is in continual contact with corrections officers whose job it is to scrutinize closely his behavior for possible rule infractions"). Courts have held that plaintiffs who are members of "an identified class of targeted individuals" have standing. *Roe v. City of New York,* 151 F.Supp.2d 495, 503-04 (S.D.N.Y.2001) (citing *Thomas v. County of Los Angeles,* 978 F.2d 504, 508 (9th Cir.1992) (holding that Black and Latino residents within a specified area had standing to enjoin conduct aimed at them)); *Nat'l Cong. for Puerto Rican Rights,* 75 F.Supp.2d at 162 (holding that residents of a small six by seven block area had standing to enjoin a racially discriminatory stop and frisk policy). Here, plaintiffs are members of an identified class of "targeted individuals."

Hence, I hold that *Lyons* is distinguishable and that plaintiffs qualify for class certification under Rule 23(b)(2).

CONCLUSION

The courts have concluded that class certification was appropriate in four other cases challenging the use of excessive force at DOC facilities. Here, I likewise hold that plaintiffs satisfy the criteria for class certification under Rule 23 and hence their motion for class certification is granted. Plaintiffs shall submit a proposed order on notice within five business days hereof.

SO ORDERED.

Not Reported in F.Supp.2d, 2003 WL 402565 (S.D.N.Y.)

Motions, Pleadings and Filings (Back to top)

. 2003 WL 23951586 (Trial Pleading) Answer for Defendant Keith Jackson to Plaintiffs' Fourth Amended Complaint (Dec. 24, 2003)

. 2003 WL 23951593 (Trial Pleading) Answer for Defendant Jaime Torres, Joseph Debblay, Benjamin Echiveria, Shamon Clark, and James Turrisi to Plaintiffs' Fourth Amended Complaint (Dec. 24, 2003)

. 1:01cv08279 (Docket)

(Sep. 05, 2001)

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