IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ALABAMA
SOUTHERN DIVISION

J.W., et al., **Plaintiffs,** **v.** **A.C. ROPER, et al.,** **Defendants.**	CLASS ACTION CASE NO. CV-10-B-3314-S

CORRECTED REPLY TO OPPOSITION BRIEFS OF DEFENDANTS ROPER, NEVITT, CLARK, SMITH, HENDERSON, BENSON, AND TARRANT AND OF DEFENDANT MOSS

Plaintiffs J.W. et al., by and through counsel, submit their reply to the opposition of Defendants Roper, Nevitt, Clark, Smith, Henderson, Benson, and Tarrant (collectively "Police Defendants") and Defendant Moss to Plaintiffs' motion for class certification. In support, Plaintiffs state as follows.

This action arises from the unlawful use of chemical weapons against Birmingham City high school students by Birmingham police officers, known as School Resource Officers ("SROs"), who are acting pursuant to the unconstitutional policy of the Birmingham Police Department (the "Police") on the use of chemical restraints and according to a deficient and inadequate Police training program on chemical restraints. In bringing this action, Plaintiffs seek

injunctive and declaratory relief to end the unconstitutional use of chemical restraints and, so long as the Birmingham Board of Education (the "School Board") permits SROs to be stationed on school grounds, ensure that the use of chemical weapons by SROs is in accordance with applicable federal and state law.[1] Because all children – persons under the age of 18 as defined by Alabama law – who attend Birmingham high schools are uniformly at risk of harm due to the Police's unconstitutional policy and deficient training program, the Plaintiffs request that the Court certify all current and future Birmingham high school students as a class. As provided below and in Plaintiffs' motion for class certification (Doc. 75, 75-1), Plaintiffs fulfill the provisions set forth in Fed. R. Civ. Pro. ("Rule") 23(a) and (b) necessary for class certification.

ARGUMENT

I. Defendant Moss's Brief Should Be Disregarded in Its Entirety

There are no current class claims against Defendant Moss or the School Board. The only plaintiff with claims against Defendant Moss is T.A.P., who is not a member of the proposed class and does not seek to represent the class. The School Board and Defendant Moss fought to be released from having to respond to the claims brought against them by the class members – and they won

[1] Defendants' Opposition erroneously states that the Plaintiffs seek declaratory and injunctive relief against Defendant Roper to "remove all [SROs] and/or to cease the use of mace against high school students in Birmingham City Schools." (Doc. 83, p. 2). Plaintiffs have never made any request for declaratory or injunctive relief that would remove SROs from Birmingham schools and solely requested that the Police discontinue the unlawful use of chemical weapons against Birmingham children.

that fight. Doc. 15, 48, 49. They should not now be allowed to reinsert themselves into the litigation of the class claims.

Defendant Moss claims that he, as a school administrator, will be directly affected by the relief sought by the class. This claim is hardly clear-cut, as school administrators do not themselves use mace and, according to the position taken in this litigation, are "powerless to prevent" the use of mace. Doc. 15, pp. 7-8. Moreover, the assertion that because he is a school administrator he will be affected by the injunction is true of at least all Birmingham City School administrators, if not all school administrators. The simple fact that certain changes will occur to the school environment if the class is certified and succeeds on the merits does not confer standing on him in the class action.

Defendant Moss also claims that he will face "increased costs and other burdens of litigation resulting from class certification." Doc. 84, p.2. While Defendant Moss is certainly entitled to continue to participate fully in the litigation, it is unclear what "increased costs and other burdens" he will be subjected to if the class is certified and he has not identified any. He would need to understand the progress of the case regardless of whether the class is certified. Presumably, he will not be required to cover any notice-related costs. His interest in the outcome of the class certification motion is nil.

He has no standing in this aspect of the litigation – because he successfully sought to have the class claims against him dismissed. He should not now be permitted to weigh in on the class claims.

II. Numerosity

The Police policy and training program on chemical restraints permits SROs to use the weapon in such a way that all students are at risk for exposure and, as result, possible psychological harm. *See Drayton, et al., v. Western Auto Supply Co.*, No. 01-10415, 2002 U.S. App. LEXIS 28211, *19 (11th 2002)(requiring a proposed class representatives to allege "real and immediate" threat of future injury to request injunctive relief). Therefore, every student attending high school in Birmingham is an appropriate class member. Accordingly, joinder is impracticable in this case. *See* Fed. R. Civ. P. 23(a)(1). Police officers are stationed at every Birmingham high school and are permitted to carry and use mace against students. *See* Ex. 1, Kennedy-Peoples Dep. 55: 1-4. Because of the limited guidance provided in Police policy on mace and the deficient mace training program, SROs use mace on students unnecessarily and in inappropriate situations. One SRO directly sprayed a female student in the face with mace after she refused to stop crying because she had been sexually harassed by a male student. Doc. 75-5, Dec. of K.B. Furthermore, SROs recklessly deploy mace so that students standing in proximity to intended targets are also affected by the chemical. *See*

Doc. 75-5, Dec. of P.S., Dec. of T.L.P. Moreover, SROs often deploy mace in closed and poorly ventilated spaces, such as hallways, classrooms, and lunchrooms, so that students and teachers are also exposed to mace simply by virtue of attending school. *See* Ex. 2, Lyons Dep. 93: 2-16, 95: 12-15 (school principal deponent stating that he and students have been affected by mace after a SRO sprayed the chemical); *see also* Ex. 3, Nevitt Dep. 45: 20-23, 46:1-7 (Defendant Officer stating that Officers do not consider the ventilation of an area prior to deploying mace in schools); Third Amend. Cmplt. ¶ 39 (detailing statements of School Board member Edward Maddox concerning the use of mace by SROs in Huffman high school and the affect that use had on students who were not the SROs intended target); Doc. 75-5, Dec. of J.W. Accordingly, all Birmingham high school children – those who are accused of engaging in misconduct, those who are standing near students accused of misconduct, and those who are merely attending school – are at risk of harm by SROs's use of mace in the school setting.

Because every Birmingham high school student is at risk for exposure, each is at risk for psychological injury. *See* Ex. 4, Dec. of Daphne Glindmeyer, ¶ 9. Use of chemical restraints, like mace or pepper spray, against adolescents in school environments is a form of corporal punishment that may be perceived by youth as a traumatic event. *Id*. at ¶ 4, 6, 7. Experiencing such a traumatic event may have

negative psychological effects for the youth – regardless of whether the youth was sprayed directly or indirectly with the chemical, or affected by backdraft. *Id*. at ¶ 6. As a result, Birmingham City high school students are at risk for several negative psychological consequences, including emotional and psychological, behavioral, cognitive, and physical impacts. *See id*. ¶¶ 10- 13. These students are at greater risk for developing Posttraumatic Stress Disorder, Major Depressive Episode, and Substance Abuse/Dependence. *Id*. at ¶ 10. Further, adolescents exposed to trauma or traumatic stressors have been shown to exhibit "greater noncompliant, defiant, and disruptive behaviors at school, which lead to greater disciplinary actions and negative consequences." *Id*. at ¶ 11. Moreover, exposure to a traumatic stressor may affect a student's cognitive ability by altering how the student records, processes and analyzes so that she cannot "accurately assess situations without an expectation of danger or harm." *Id*. at ¶ 12. Exposure to traumatic events like those experienced by Birmingham high school students as a result of SROs' actions also "have been shown to impact the physical functioning and neurobiology of children and adolescents." *Id*. at ¶ 13. Youth exposed to such trauma "may have disruptions in sleep that persist across time" and complain of "headaches or stomachaches that were not present prior to the traumatic event." *Id*.

The 8,000 students who attended Birmingham City high schools during the 2009-10 school year, along with the number of students who have entered and will continue to enter Birmingham schools in the coming years, are all at risk for exposure to mace and, accordingly, psychological injury in the form of post-traumatic stress. The large number of affected students makes joinder impracticable, fulfilling Rule 23(a)'s numerosity requirement.

Defendants assert that there have only been about 100 students who have been affected by mace since 2006. This is incorrect on several levels.[2] There have been approximately 131 students who have been sprayed with mace and *arrested* by SROs since 2004, all but 7 of them occurring from the 2006-2007 school year through the present. Doc. 75-6; Ex. 1 to Plaintiffs' Response to Defendants' Motion to Strike Exhibits to Plaintiffs' Motion for Class Certification.[3] That figure does not include students who were sprayed with mace solely because they were standing in proximity to a SRO's intended target or students who were harmed by mace because they were in a school area in which a SRO deployed mace. For example, there are no reports for P.S. or J.W., although both suffered from the effects of mace. *Id*. Throughout the police reports, there are numerous instances where, for example, three students were involved in a fight,

[2] Defendants' assertion that there have been 35,000 students in Birmingham City high schools over the last five years also appears to be incorrect. There are approximately 8,000 students in the high schools at any given time. For there to have been 35,000 students in five years assumes a turnover rate in students of 87.5% every year.
[3] Plaintiffs have filed a motion to file the incident and arrest reports attached at this exhibit under seal with the Court. Doc. 89.

but only two were reported as being maced. *Id*. Given that mace is airborne and travels, the third student in such a case would likely have been affected, even if not sprayed directly. And this figure does not even begin to address the students, like P.S. and J.W., who are not involved in an incident but are in the vicinity.

Furthermore, the Police Defendants' characterization of all the children who were maced as "violent" or "criminal" is inaccurate. *See* Doc. 83, pp. 3, 12. Neither J.W. nor P.S. was engaged in any violent or even disrupting behavior. Doc. 75-5. K.B. was crying after being sexually harassed by another student. *Id*. G.S. was chasing after another student who had hit her. *Id*. Further, none of the named Plaintiffs was prosecuted for the conduct that led to their macing and arrest.

None of the macing incidents for the named Plaintiffs involved "drugs, guns, knives and gangs" – the specter of violence the Police Defendants used to justify the use of chemical weapons against children. *See* Doc. 83, p. 2. Indeed, the incident reports and police reports for all the macings in the schools since 2004 reveal that none of the macings involved students with guns, knives or drugs, and only one incident (in which two students were maced) included any allegation that the children were in gangs. *See* Doc. 75-6; Ex. 1 to Plaintiffs' Response to Defendants' Motion to Strike Exhibits to Plaintiffs' Motion for Class Certification.

Indeed, the Police policy on mace is so broad there are virtually circumstances in which it is considered inappropriate. Kennedy-Peoples Dep. 120: 11-21.

Given the testimony regarding the low levels of misconduct that led to the macings of the named Plaintiffs, the dearth of evidence of weapons connected with the macings, and the extraordinarily broad policy on the use of mace, many if not most of the incidents leading to the 131 school macings are likely to have been typical school misconduct. There is nothing in the record to substantiate the Police Defendants' assertion that the children who are maced are "violently acting teenager(s) committing criminal acts." *See* Doc. 83, p.3.

Birmingham high schools are policed by SROs with virtually unlimited discretion to mace students who act up. High school students in Birmingham, like high school students everywhere, do at times act up. As a result, Birmingham high school students – unlike the students in the vast majority of communities where mace is not used in schools – are at risk every day of being maced. These 8,000 students each year are the appropriate class.

III. Typicality and Commonality

Plaintiffs' motion for class certification provides substantial evidence from SRO testimony and other documents of commonality and typicality derived from the Plaintiffs' allegations. *See* Doc. 75 and 75-1. Testimony of Defendant SROs

provides further evidence of the extent of the commonality of the proposed class claims. Defendant SROs provided varying standards for deciding when it is appropriate to spray students with mace. For example, Defendant Nevitt testified that it is appropriate to mace a student who is pulling another student's hair in a fight. Nevitt Depo. 68: 1-5. When asked about the same scenario, Defendant Clark stated that it would be inappropriate to use mace against a student in that situation, explaining that "soft hand control" techniques should be used. Ex. 5, Clark Dep. 198: 3-12. This divergence in standards is evidence that the Police policy on mace fails to provide sufficient guidance on its use. That deficiency provides a basis of relief for every student who is subject to the policy and is at risk for harm pursuant to the policy.

Deposition testimony from Defendant SROs also supports Birmingham high school students' claim that the Police training program on mace is inadequate and, perhaps, functionally non-existent. The Police Defendants claim they are trained annually on the use of mace. Doc. 83, p.6. However, as stated in Plaintiffs' motion for class certification, several officers have not received any training on the use of mace since their time at the police academy – often more than 10 to 20 years ago. *See* Doc. 75-1, p. 5; Ex. 6, Tarrant Dep. 334: 15-22; Ex. 7, Benson Dep. 71: 15-21. Those Defendant officers who do recall some training on the use of mace since their time at the police academy are unable to recall any of the specific

matters covered during the trainings despite the claim that the training occurs every year. Nevitt Dep. 47: 10-22, 167-170; Clark Dep. 51: 8-13, 203: 21-23, 204:1-4; Benson Dep. 69: 6-14. Defendant Roper's apparent failure to provide training – adequate or otherwise – to SROs is one of the common issues in this matter. Accordingly, class certification is appropriate.

The supposed distinctions referenced in the Police Defendants' opposition brief are illusory. Regardless of the officers involved in the individual incidents, their backgrounds, perceptions, or training, each acted pursuant to Defendant Roper's unconstitutional policy and deficient training program on chemical weapons. *See* Doc. 83, p. 14-15. Furthermore, the criminal charge and disciplinary action that may or may not have resulted from the incidents alleged by the Plaintiffs, as well as the potential witnesses to each incident and scene of the incident, have no bearing on the key issue of the case – the constitutionality of the policy on chemical restraints and the deficiencies of the training program on chemical restraints. *See id*. The prevailing commonality in this matter is the Police policy on mace that permits SROs to use mace against students in a broad range of situations with no guidance and the training program that fails to properly equip SROs with the needed expertise to deploy mace in a school environment.

Furthermore, the Defendants' reliance on *Kerr, et al., v. City of West Palm Beach, et al*., is misplaced. 875 F.2d 1546 (11th Cir. 1989). The proposed class

representatives in *Kerr* requested class certification pursuant to Rule 23(b)(3) and were seeking compensatory and punitive damages for the class, while the Plaintiffs in this matter have requested certification pursuant to Rule 2(b)(2) and are not seeking damages for the class. *Id*. at 1557-58. Rule 23(b)(3) requires that the Plaintiffs show that "questions of law or fact common to class members predominate over any questions affecting only individual members" – a "far more demanding" test than Rule 23(a)'s commonality requirement. *United Wis. Servs. v. Abbott Labs.* , 220 F.R.D. 672 (S.D. Fla. 2004) (quoting *Jackson v. Motel 6 Multipurpose*, 130 F.3d 999, 1005 (11th Cir. 1997). Rule 23(b)(2) provides that the proposed class representatives show that "the party opposing the class has acted or refused to act on grounds that apply generally to the class, so that final injunctive relief or corresponding declaratory relief is appropriate respecting the class as a whole." *See Anderson et al., v. Garner, et al*., 22 F.Supp. 2d 1379, 1387 (N.D. Ga. 1997) (finding that the defendants reliance on *Kerr* was misplaced because the plaintiffs sought certification pursuant to Rule 23(b)(2), rather than 23(b)(3) and, accordingly, need show only common questions of law, not predominance of common questions of law or fact). As provided above and in the Plaintiffs' motion for class certification, the Police policy and training program on chemical weapons places children attending Birmingham high schools at risk for exposure to the chemical and harm. Plaintiffs have provided sufficient common

questions of law necessary for class certification. *See Anderson*, 22 F.Supp. 2d at 1387.

Defendant Moss also argues, relying on *Wal-Mart Stores, Inc. v. Dukes*, 131 S. Ct. 2541 (U.S. 2011), that because the Police Defendants' policy allows discretion in the use of mace, commonality is lacking. Doc. 84, pp. 7-8. Moss's reliance on *Wal-Mart* is misplaced. In *Wal-Mart*, the plaintiffs alleged that, in violation of Wal-Mart's stated policy of non-discrimination, the company, through pattern and practice, had a "general policy of discrimination". *Wal-Mart*, 131 S. Ct. at 2553. The Court found that in a company with a non-discrimination policy, the size and geographic scope of *Wal-Mart*, and a lack of evidence of similarity in the way promotions were made, commonality was not shown. *Id*. at 2553-55. Here on the other hand, there is only a police granting essentially unfettered discretion to SROs to use mace. *See* Kennedy-Peoples Dep. 120: 11-21. There is a small group of SROs – only about 32 have worked in schools in Birmingham. Kennedy-Peoples Dep. 87:3-14. They work in a single unit, and are stationed at just 8 high schools. *Id*. There is a great deal of similarity between the incidents, including particularly that the children involved were engaged in low-level misconduct, were maced in the face from a close distance in violation of industry standards, and were not prosecuted for the alleged "violent" or "criminal"

behavior. *Wal-Mart* does not support a finding that the Plaintiffs' claims here lack commonality.

IV. Adequacy of Representation

Plaintiffs adequately represent the interests of the proposed class because there are no conflicts between the named Plaintiffs and the proposed class and counsel for the Plaintiffs are more than equipped to represent the class. *Valley Drug Co. v. Geneva Pharms., Inc*., 350 F.3d 1181, 1189 (11th Cir. 2003).

A. Adequacy of the Class Representatives.

Courts are clear that "the existence of minor conflicts alone will not defeat a party's claim to class certification." *Valley Drug Co.*, 350 F.3d at 1189. Rather, "the conflict must be a 'fundamental' one going to the specific issues in controversy." *Id*. Essentially, the "fundamental conflict exists where some party members claim to have been harmed by the same conduct that benefitted other members of the class." *Id*. The named Plaintiffs in this matter have no such conflict. As provided in Plaintiffs' motion for class certification, the named Plaintiffs and the members of the proposed class all have an interest in attending school in a safe environment in which they are not at risk for exposure to a dangerous chemical. *See* Doc. 75, 75-1, p. 17.

Defendants' opposition briefs fail to provide any sustainable argument to the contrary. The opposition briefs allude to possible antagonistic interests between

the named Plaintiffs and the proposed class, but fail to provide any concrete examples of such conflicts. Police Defendants point solely to Plaintiff T.A.P., claiming her to be in conflict because she quit school after being maced. Doc. 83, p.18. That example is inapposite because T.A.P. does not seek to represent the proposed class.

The Police Defendants also allude to the possibility that some of the named Plaintiffs are no longer enrolled in Birmingham high schools and are adults. Because time does not stand still during the course of litigation, it most certain that the Plaintiffs have grown older in age and, in some cases, matriculated. The inability of the Plaintiffs to remain adolescents during the course of litigation does not remove their right to pursue legal remedy for harms they incurred while students in Birmingham high schools or to represent other similarly situated students.

Defendant Moss speculates, with no support, that there is a conflict between students who want to "preserve order" and have a school environment conducive to learning and the named Plaintiffs. Doc. 84, p.11. Defendant Moss relies on *Valley Drug* for his position that this purported conflict that he believes might exist disqualifies the named Plaintiffs as class representatives. Doc. 84, p. 10-11. This reliance is misplaced. In *Valley Drug*, an anti-trust case, there was *evidence* that some of the putative class members had economically profited from the transaction

that was at the center of the case, whereas the putative class representatives had been economically harmed by the transaction and were seeking damages. *Valley Drug Co.*, 350 F.3d at 11. Here, there is no such direct or fundamental conflict. First, there is no evidence of any sort of a conflict between the named Plaintiffs and other students. Second, the named Plaintiffs also want an orderly school environment that is conducive to learning. They want to go to school in safety and security. They want to know that if they cry, or try to help their sister, or react to a student who has called them a name or hit them, they will not be maced.

Defendant Moss also argues that because some of the named Plaintiffs were arrested, there may be individualized defenses, making all the named Plaintiffs inadequate class representatives. Doc. 84, p. 9-10. There are numerous problems with Defendant Moss's argument. First, the authority Moss relies on is a dissent with no precedential value, although Moss incorrectly attributes it to the Eleventh Circuit. *See Thompson v. RelationServe Media, Inc.*, 610 F.3d 628, 679 (11th Cir. 2010). The Court did not address adequacy of representation at all. Second, the dissent was focused on putative class representative having pled himself out of a claim: he was bringing a fraud claim, and he pled that he knew of the alleged misrepresentation prior to entering into the fraudulent transaction. *Id*. Here, there is no such problem. Further, although some of the named Plaintiffs were arrested, none was prosecuted, calling into doubt the basis for their arrests. The validity of

the arrests is even more dubious given SRO testimony that all children maced are arrested to provide the officer with cover from potentially angry parents. Clark Dep. 206: 14-23, 207: 1-9. Finally, what is at issue in the class claims are the policy and the training, not the individual actions.

B. Adequacy of Class Counsel

Plaintiffs' counsel has demonstrated that they will adequately represent the proposed class in this matter. "Counsel will be deemed adequate if they are shown to be qualified, adequately financed, and possess sufficient experience in the subject matter of the class action." *City of St. Petersburg, et al., v. Total Containment, Inc., et al*., 265 F.R.D. 630, 651 (S.D. Fla. 2008)(*citing Dahlgren's Nursery, Inc. v. E.I. DuPont De Nemours & Co*., No. 91-8709-CIV, 1994 WL 1251231, at *6,-*7 (S.D. Fla. 1994)). In their motion for class certification, Plaintiffs' counsel submitted a declaration from Mary Bauer swearing to her extensive experience in civil rights and class action litigation, as well as the experience of co-counsel Ebony Howard. *See Sandlin v. Ameriquest Mortg., Co*., 2010 Bankr. LEXIS 3755, *26,*27 (Bankr. N.D. Ala. 2010)(finding plaintiffs' counsel in adequate to represent the proposed class because he had not provided an affidavit, testimony, or any other evidence as to his qualifications to serve as class counsel); *Hill v. Butterworth, et al*., 170 F.R.D. 509, 517 (N.D. Fla. 1997).

Police Defendants specifically admit the competency of Mary Bauer, the attorney overseeing this litigation, to handle it. Doc. 83, p. 19. They question only whether attorney Howard possesses sufficient experience in handling class action matters. *See* Doc. 83, p. 19. Attorney Bauer's extensive experience, along with experience of the Southern Poverty Law Center generally with regard to complex litigation in the southern region fully, meets the adequacy requirement. The work submitted to the Court by Plaintiffs' counsel during the course of this litigation demonstrates that they are not only competent to manage this class action, but also that they possess the rigor and dedication necessary to pursue the interests of the class. *See Lifestar Ambulance Service, Inc., et al.*, v. U.S., et al., 211 F.R.D. 688, 701 (M.D. Ga. 2003)(finding that class counsel's experience along with their efforts during the course of litigation demonstrated commitment to vigorous prosecution of the action and the accompanying skills necessary for the litigation). The Police Defendants provide no information to suggest any deficiency in the litigation team, complaining only that they do not believe attorney Howard is adequate. They make this assertion despite the sworn attestation of attorney Howard's supervisor – whose competence they admit – regarding attorney Howard's years of experience and competence to handle this litigation. The combined experience and commitment to this case demonstrated thus far that the

Plaintiffs' litigation team is more than adequate to represent the interests of the proposed class.

V. Class-Wide and Declaratory and Injunctive Relief

Plaintiffs' motion for class certification provides sufficient evidence to support certification of the proposed class pursuant to Rule 23(b)(2). Specifically, Plaintiffs have properly alleged that Defendant Roper has acted or refused to act on grounds generally applicable to the proposed class by subjecting Birmingham high school students to an unconstitutional policy and deficient police training program on mace. *See* Doc. 75-1, p. 18-19; Fed. R. Civ. P. 23(b)(2). Plaintiffs have also requested declaratory and injunctive relief on behalf of the proposed class. *See* Doc. 75-1, p. 18-19; *see also Ass'n for Disabled Americans, Inc. v. Amco Oil Co*., 211 F.R.D. 457, 465 (S.D. Fla. 2002).

As support for their attack on Plaintiffs' suitability for class certification pursuant to Rule 23(b)(2), Defendants assert that the Plaintiffs have not proven that the Police policy on mace is unconstitutional or a danger. *See* Doc. 83, p. 20. Police Defendants also argue based on several federal evidentiary rules that a declaration provided by the Plaintiffs from Dr. Michael Cohen does not provide proof of the dangers of chemical. *See* Doc. 83, p. 4.

Police Defendants' argument misunderstands Rule 23(b)(2). Plaintiffs need not prove their case to fulfill the obligations set forth in Rule 23(b)(2). Indeed, at

class certification, "the Court may not pass on the merits of plaintiffs' claims." *Fisher v. Ciba Specialty Chems. Corp.,* 238 F.R.D. 273, 296 (S.D. Ala. 2006). The key inquiry under Rule 23(b)(2) is "whether the Plaintiffs' claim for injunctive relief addresses conduct that is generally applicable to the proposed class." *Anderson,* 22 F.Supp. 2d at 1382. "The focus thus is on the nature of Plaintiffs' claims minimizing the need to scrutinize evidence that will be adduced to support the claims." *Id*. "To the extent that an examination of the evidence in the record is necessary, the court inquires only whether evidence exists to support Plaintiffs' claims, *not whether the evidence can survive factual challenges levied by Defendants*." *Id*. (emphasis supplied)(citing *In re Domestic Air Transp. Antitrust Litig.*, 137 F.R.D. 677, 684 (N.D. Ga. 1991); *see also Telecomm Tech. Servs. V. Siemens Rolm Communs., Inc.*, 172 F.R.D. 532, 543 (N.D. Ga. 1997)(stating that the court will ensure "through information submitted outside of the pleadings that the requirements of Rule 23 are met, not whether plaintiffs' claims are viable.")

Moreover, Police Defendants' arguments against the entry of Dr. Cohen's declaration are inapposite because the Federal Rules of Evidence do not apply with the same force at the class certification stage of litigation compared to the trial stage of litigation. *See* Plaintiffs' Response To Defendants' Motion to Strike Exhibits from Plaintiffs' Motion for Class Certification, Doc. 87.

For the foregoing reasons, the Plaintiffs request that the Court grant their motion for class certification.

Respectfully submitted,

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List of Attached Exhibits

1. Deposition of Cathy Kennedy-Peoples
2. Deposition of John Lyons
3. Deposition of Officer Jamarah Nevitt
4. Declaration of Daphne Glindmeyer
5. Deposition of Anthony Clark
6. Deposition of Ricky Tarrant
7. Deposition of Marion Benson

CERTIFICATE OF SERVICE

I hereby certify that on the 28th day of November, 2011, I electronically filed the foregoing with the clerk of the court by using the CM/ECF system, which will send a notice of electronic filing to the following:

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