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UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

SANTEYA DANYELL WILLIAMS, MARY RUTH SCOTT, KAREN LATREECE COLEMAN, PRISCILLA BUNTON, and ALYCE DENISE PAYNE, on behalf of themselves and all others similarly situated,

Plaintiffs,

v.

CITY OF ANTIOCH,

Defendant.

No. C-08-2301 SBA

**PLAINTIFFS' REPLY BRIEF IN SUPPORT OF CLASS CERTIFICATION**

Date: January 12, 2010
Time: 1 p.m.
Before: Honorable Saundra Brown Armstrong

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## I. INTRODUCTION

It is undisputed that Section 8 recipients represent less than 6% of all Antioch households but have been the major focus of the Antioch Police Department's CAT unit. It is also undisputed that most of the Section 8 locations targeted are African-American households and that this targeting takes place pursuant to a consistent policy and practice. Whether this targeting violates the law, or can be justified, are the major issues in this case. Rather than address whether these issues warrant class certification, Defendant City of Antioch uses the bulk of its opposition brief to mount a full-throated attack on the merits of plaintiffs' case. To shore up its vitriol, defendant has unloaded on the Court a mountain of documents, deposition excerpts, audio recordings and declarations, including some that have actually been doctored. Evidently, defendant expects the Court to wade through this data dump to find the specific record citations that it did not provide in its brief. If the Court decided to undertake this search, it would quickly discover that defendant's brief is rife with factual inaccuracies and material omissions.[1]

Defendant hopes to create enough confusion to obscure the fact that plaintiffs have indeed met the requirements of Rule 23. Notwithstanding defendant's obfuscation, the case presents two overarching common questions of law and fact. First, did defendant and its CAT unit engage in a pattern or practice of targeting Section 8 recipients, and particularly those who are African American, for excessive police scrutiny? Second, is this pattern or practice justified or explained by any of the arguments raised by defendant? These questions apply uniformly to all class members and will not require individual mini-trials as defendant argues.

Without much subtlety, defendant implies that the plaintiffs and class members are nothing more than criminals deserving of the community's condemnation and the full measure of law enforcement scrutiny. In reality, what unites the plaintiffs and class members is that they are poor, and their lives reflect the vicissitudes of poverty. As a result, the class is uniquely

[1] The Court would also find documents that defendant has never previously produced, documents created for litigation and — most remarkably — documents that defendant has altered from the form in which they were produced in discovery. These include an audio clip that has been selectively edited to excise evidence of racial bias on the part of CAT officers. Plaintiffs concurrently file a Motion to Strike Evidence to address these evidentiary problems.

vulnerable to the abridgement of their rights in the name of preserving the city's 'quality of life.' The need for class treatment to challenge these practices is manifest.

## II. ARGUMENT

### A. Defendant's Opposition Papers Violate Civil Local Rule 7 – 5

Defendant's brief and supporting documentation, prepared by experienced counsel, do not comply with this Court's requirements. For the benefit of the Court and to prevent prejudice to an opposing party, Civil Local Rule 7–5(a) mandates that "[f]actual contentions made in support of or in opposition to any motion must be supported by . . . declaration and by appropriate references to the record." Defendant uses various techniques to obscure the issues rather than provide necessary factual support, because such support does not exist in the record. For example, instead of citing the specific page or paragraph numbers of its exhibits, defendant cites generally to various exhibits and depositions that are dozens or sometimes hundreds of pages long, leaving it to the reader to ferret out where the facts can be found. *See, e.g.*, Beatty Decl., No. 1, Ex. G (40 pages; cited Opp. Brief at 16). The brief cites to deposition excerpts not included among the exhibits. *See* Opp. Brief at 8:5. Moreover, these general citations to the record are only provided every few paragraphs rather than, as would be appropriate, for each fact cited. *See, e.g.*, Opp. Brief at 10:13–15; 23:14–24:8. Some factual assertions have no citations at all. *See, e.g.*, Opp. Brief at 18:17–19:7.[2]

> The court . . . is not required to consider evidence that is buried in a two-foot-tall stack of paper, where the parties do not specifically direct the court's attention to the *exact page* where the evidence is to be found and do not explain the significance of the evidence in their memoranda of points and authorities.

*Mannick v. Kaiser Found. Health Plan, Inc.*, 2006 WL 2168877, at *18 (N.D. Cal. July 31, 2006) (emphasis added); *see Carmen v. San Francisco Unified School Dist.*, 237 F.3d 1026, 1030-31 (9th Cir. 2001). Accordingly, this Court should disregard all factual contentions in

[2] Defendant submitted five binders of *additional* documents totaling over 3300 pages, but concedes that "it is not expected that the Court can carefully review all 5 such binders." Opp. Brief at 10:21-22. Defendant does not explain *what* it expects the Court to do with the binders or how this evidence supports its arguments.

defendant's brief not properly supported by "appropriate references" to the record.

**B. Defendant Improperly Argues the Merits of the Underlying Claims**

Defendant's arguments focus on the merits of the underlying claims, which is inappropriate at class certification. *See Californians for Disability Rights v. Cal. Dept. of Transp.*, 249 F.R.D. 334, 345 (N.D. Cal. 2008) (*citing Eisen v. Carlisle & Jacquelin,* 417 U.S. 156, 177 (1974)). While some consideration of the merits may be necessary to the determination of Rule 23 requirements, *Hanon v. Dataproducts Corp.,* 976 F.2d 497, 509 (9th Cir. 1992), defendant has not so presented its arguments.

Erecting the classic "straw man," defendant repeatedly faults plaintiffs for failing to prove the existence of a "concerted campaign" of "racial cleansing" or a "Nazi-esque pogrom against the African-American race and Section 8 recipients." Opp. Brief at 1:18, 14:15, 20:2. By ignoring plaintiffs' allegations of a *pattern and practice* case, defendant treats the case as if it is no more than five plaintiffs, together with "49 'putative' plaintiffs," who must each prove individual claims of discrimination. Opp. Brief at 9:13. This case requires class treatment precisely because it challenges not the random set of individual police encounters that defendant postulates, but rather a consistent pattern and practice of police conduct. In fact, CAT officers consistently follow written policy guidelines for their work and followed those guidelines with respect to the named plaintiffs and class members. Opening Brief at 22:26–23:3.

As this Court recognized in *Californians for Disability Rights,* the question of whether there is a centralized policy of discrimination in violation of federal and state law is "precisely what is at issue" here. 249 F.R.D. at 345. Defendant "cannot defeat certification by . . . prematurely assuming that no such centralized policy exists." *Id.* Moreover, in *Californians for Disability Rights,* the Court rejected a plaintiff-by-plaintiff approach to the evidence, similar to that raised by defendants, explaining:

> defendant's argument — that in order to prove the existence of the forest the plaintiffs must individually prove the existence of each tree — is anathema to the very notion of a class action. Taken to its logical conclusion, under defendants' reasoning, no civil rights action would ever be maintainable.

*Id.* As argued in plaintiffs' opening brief and accompanying motion for bifurcation, if the class

1 is certified, the merits would be addressed at the appropriate time, with a combination of
2 systemic, statistical and anecdotal proof, under the *Teamsters v. United States* model. *Int'l*
3 *Broth. of Teamsters v. U.S.*, 431 U.S. 324, 337-39 (1977).

4 **C. The Class Has Standing and Is Properly Defined**

5 Defendant argues that the class cannot be certified because, as defined, it includes
6 individuals who lack standing. Opp. Brief at 30:11-31:12. Controlling law in the Ninth Circuit –
7 not cited by defendant – holds to the contrary: Article III standing for the class is satisfied so
8 long as at least one named plaintiff has standing. *Bates v. United Parcel Service, Inc.,* 511 F.3d
9 974, 985 (9th Cir. 2007). Here, each of the named plaintiffs has alleged that the Antioch police
10 targeted her because of her race and Section 8 status.

11 Defendant next alleges that plaintiffs' proposed class definition is improper because it
12 would require the court to determine the merits of individual claims in order to ascertain who is a
13 member of the class. Opp. Brief at 31-32. To the contrary, the proposed class definition is not
14 framed as those who have been injured by unwarranted police scrutiny. Rather, class
15 membership is defined as African Americans who live in Antioch and hold or have held Section
16 8 vouchers. *See* Opening Brief at 20:24-28 for complete definition. Membership is objectively
17 ascertainable. *See Moyle v. County of Contra Costa,* 2007 WL 4287315, *18 (N.D. Cal. Dec. 5,
18 2007) (in strip search class action, court rejects contention that class membership requires
19 individualized factual determinations).

20 Defendant also argues that a challenge to illegal law enforcement practices can be
21 certified as a class action only where the case presents a "blanket policy or ordinance." Opp. at
22 32:5-6. The law includes no such limitation and defendant cites no case that so holds.
23 Numerous class actions challenging allegedly illegal law enforcement practices have not
24 involved such "blanket" ordinances or policies. *Kincaid v. City of Fresno,* 244 F.R.D 597, 601
25 (E.D. Cal. 2007) (practice of conducting sweeps of homeless encampments and destroying
26 personal property); *Hickey v. City of Seattle,* 236 F.R.D. 659, 664 (W.D. Wash. 2006) (mass
27 arrests outside the No-Protest zone); *Int'l Molders' and Allied Workers' Local Union No. 164 v.*
28 *Nelson,* 102 F.R.D. 457, 460 (N.D. Cal. 1983) (challenge to INS workplace raids targeting

Hispanics). Indeed, in many civil rights class actions, plaintiffs must prove the *existence* of the illegal discriminatory practice through circumstantial evidence as part of their case. *See e.g. McClain v. Lufkin Industries,* 519 F.3d 264, 275-277 (5th Cir. 2008); *Stender v. Lucky Stores,* 803 F. Supp. 259, 332 (N.D. Cal.1992).[3]

As a factual matter, plaintiffs do not, as defendant argues, rest their case on a series of individual stories of police misconduct. Instead, plaintiffs have marshaled police department documents and policy guidelines, admissions from police and city officials, witness statements, statistical proof and anecdotal evidence to demonstrate that defendant has a practice of targeting Section 8 recipients for excessive scrutiny. *See* discussion of commonality evidence *infra* at Section II.E. This evidence demonstrates the existence of a common and uniform practice. Courts have rejected the argument that the facts surrounding individual arrests defeat class treatment in law enforcement challenges. *See, e.g.*, *Hickey*, 236 F.R.D. at 664; *Int'l Molders,* 102 F.R.D. at 462-63.

Finally, defendant objects to the inclusion of class members who "will reside" in the city in the future, but again cites no authority for its concern. The inclusion of future class members is a routine feature of class actions, such as this one, that seek injunctive relief. *See, e.g.*, *Arnold v. Ariz. Dept. of Pub. Safety,* 2006 WL 2168637, at *5 (D. Az. July 31, 2006); *Ledford v. City of Highland Park,* 2000 WL 1053967, at *1 (N.D. Ill. July 31, 2000); *Int'l Molders,* 102 F.R.D. at 461; *see also* Manual for Complex Litig. Fourth §21.222 ("A class may be defined to include individuals who may not become part of the class until later.").

### D. The Class Satisfies Numerosity

Plaintiffs demonstrated that the class, as defined, is comprised of over 1000 individuals. Opening Brief at 21:10-11. Defendant does not dispute that calculation. Instead, it attempts to artificially narrow the class definition in two ways, and then argues that the small remaining subset can be managed through joinder. Opp. Brief at 33-34. These arguments fail.

[3] If it were otherwise, racial profiling by law enforcement could rarely be challenged in a class action since no police department or city council would adopt a facially discriminatory policy.

First, defendant seeks to limit the class to only those individuals who are named plaintiffs or who have so far stepped forward as potential witnesses in the litigation. Membership in a Rule 23 class is not, however, limited to those individuals who affirmatively express a desire to join the class nor is that the test for numerosity. Indeed, in a case challenging a policy of police targeting, there may be good reasons that class members are reluctant to step forward. *Lehr v. City of Sacramento,* 2009 WL 2590628, at *3 (E.D. Cal. Aug. 21, 2009) (rejecting argument that numerosity is lacking where only one homeless individual stepped forward); *Kincaid v. City of Fresno,* 244 F.R.D 597, 601 (E.D. Cal. 2007) (numerosity satisfied although only 23 claims for damages filed).

Because even that number (54 named and "putative" plaintiffs) would still be sufficient to support class certification,[4] defendant attempts to further limit that group to only those individuals whose homes have already been designated by the police department as "CAT properties." Opp. Brief at 34:4-6. Plaintiffs have never so limited their case and have provided evidence of police targeting of class members that did not result in the police designating the home as a CAT location. *See, e.g.*, Evans Decl., Mays Decl., Rogers Decl., and Lewis Decl. Moreover, because this case challenges a pattern or practice and not merely a policy, the class definition appropriately includes all persons who are subject to illegal targeting under that practice.

**E. This Case Presents Common Questions of Law or Fact**

Defendant disputes that commonality is satisfied by contending that many class members do not live at CAT locations, were not referred to the Housing Authority for revocation, and were not subject to home searches. Opp. Brief at 34:13-19. Commonality does not, as defendant claims, require a showing that every class member has been injured by the challenged practice or injured in the same way. *Staton v. Boeing Co*., 327 F.3d 938, 953-54 (9th Cir. 2003)

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[4] *See Cox v. American Cast Iron Pipe*, 784 F.2d 1546, 1553 (11th Cir. 1986) ("while there is no fixed numerosity rule, 'generally less than twenty-one is inadequate, more than forty adequate, with numbers between varying according to other factors'.") (quoting 3B MOORE'S FEDERAL PRACTICE ¶ 23.05[1] at n.7 (1978)).

(commonality satisfied where multiple employment practices were challenged in one case, even though not every class member was affected by every practice); *Satchell v. FedEx Corp.*, 2005 WL 2397522, at *4 (N.D. Cal. 2005) ("A defendant's actions need not affect each class member in the same manner."). The fact that the defendant may have acted within the requirement of the law with respect to certain class members will not defeat certification either. *See Walters v. Reno*, 145 F.3d 1032, 1047 (9th Cir. 1998) (certification proper even though a few branch offices ignored agency's policies and employed procedures that met constitutional standards).

**1. Plaintiffs Have Demonstrated a Common Question Regarding Defendant's Policy and Practice of Targeting Section 8 Recipients**

Plaintiffs allege a common policy and practice of targeting Section 8 recipients for heightened police scrutiny. Defendant focuses myopically on the intentional race discrimination claim without recognizing that plaintiffs have entirely independent claims for adverse impact and for 'source of income' discrimination under the Fair Employment and Housing Act ("FEHA"), claims that do not require proof of intentional racial discrimination. *See* Opening Brief at 18:13-19:12.[5] Plaintiffs have established at least one common question as to the practice of targeting Section 8 recipients described below.

As demonstrated in the Opening Brief, the evidence of this uniform policy and practice includes:

- the Antioch police repeatedly attempted to obtain a list of all Section 8 recipients living in Antioch from the Housing Authority; (Opening Brief at 8:2-5)
- Antioch police used various other methods to ascertain whether a renter was a Section 8 recipient; (*id.* at 8:7-13)
- Antioch police maintained a map designating homes receiving Section 8 benefits; (*id.* at 8:13-14)
- the CAT Case Flow Chart which sets forth the protocol that CAT officers were to follow, and consistently did follow, with regard to Section 8 properties; (*id.* at 7:12-24)

[5] Plaintiffs' claims based upon Fourth Amendment violations also require no proof of racial discrimination. Opening Brief at 19:20-23.

- the close working relationship between the Antioch police, particularly CAT officers, and members of UCBN, an organization formed to combat "Section 8 abuse"; (*id.* at 8:18-25)

- the CAT practice of investigating non-criminal complaints or program violations at Section 8 homes and using that information as the basis for revocation referrals to the Housing Authority and letters to landlords; (*id.* at 4 & n.4, 11-12)

- the solicitation and encouragement of citizen complaints about Section 8 recipients by defendant, through door hangers, distribution of hard-copy complaint forms, and a link on its website to the Housing Authority complaint form; (*id.* at 8-9)

- monthly CAT reports which tracked the number of Section 8 recipients submitted for revocation to the Housing Authority and the number actually revoked; (*id.* at 12:2-10)

- a tracking log of the status of all Section 8 referrals to the Housing Authority; (*id.*)

- department reports and presentations that highlighted enforcement efforts against Section 8 homes and the disproportionate resources dedicated to Section 8 homes enforcement; (*id.* at 6:22-7:2)

- CAT focused more on Section 8 homes in the higher-income zip code, even though these were not the high crime areas; (*id.* at 5, 7)

- the admission that top Antioch police officials personally resented that Section 8 rules permitted voucher holders to rent large single family homes in Antioch; (*id.* at 4) and

- statistical evidence that the challenged practice in fact had a disproportionate impact on Section 8 households (further discussed below).

### 2. Plaintiffs Demonstrated a Common Question Regarding Whether Defendant's Practice of Targeting Section 8 Recipients Has a Disparate Impact on African Americans

Plaintiffs have also raised a common question as to whether the challenged practice described above has a disparate impact on African-American Section 8 recipients.[6] To support this claim, plaintiffs offered the report of expert Dr. Barry Krisberg who concluded that the CAT practices had a disproportionate impact on. . . African-American Section 8 voucher holders." Defendant objects to Dr. Krisberg's conclusions in a number of respects, and we address those

[6] Antioch misstates the legal standards for proof of class-wide disparate impact cases. Opp. Brief at 24:9-18. It conflates the standards for individual disparate treatment claims (*Harris v. Itzhaki,* 183 F.3d 1043, 1051 (9th Cir. 1999)), with *part* of the showing required for disparate impact claims. It also incorrectly asserts that disparate impact claims cannot be proven by circumstantial evidence, which is not accurate.

arguments below.[7] Defendant includes a number of figures and calculations in its brief (*see e.g.* Opp. Brief 23:6-12) not anchored to any factual recitations and, as a result, plaintiffs have been unable to recreate those calculations.

Not Responsible for Percentage of African-American Section 8 Recipients — As part of his analysis, Dr. Krisberg determined the percentage of African Americans among all Antioch residents, Antioch renters and Section 8 recipients. Defendant complains that it has no control over how many African Americans live, rent or receive Section 8 vouchers in the city. Opp. Brief at 22:14-18. Dr. Krisberg's analysis in no way suggests that it does. Instead, he found that *through its policy and practice of targeting Section 8 households*, CAT necessarily disproportionately impacts African Americans who are overrepresented among Section 8 households when compared to their representation in the general Antioch population. Krisberg Decl. at 11–12.

Decline in Percentage of Section 8 Households Among CAT Locations Between 2006 and 2009 – Dr. Krisberg found that the percentage of Section 8 households among CAT locations was highest in 2006 (58 %) and 2007 (52 %) and that the percentage declined somewhat in 2008 (34 %). Krisberg Decl. at 13–14; Dang Decl., Ex. A, at 4–5. Defendant does not dispute the figures, only what inference should be drawn from them. Defendant argues that the decline was a result of "cleaning up" purported problems at the Housing Authority, although the timing does not correspond with the statistics (it asserts that Housing Authority Director Tamayo was "fired" in March 2007 while its expert, Dr. Withrow, asserts that the decline in CAT Section 8 cases occurred in the second half of 2008). Opp. Brief at 6:6-7, 23:9-13; Withrow Decl. 6:18 – 19. This common issue is ultimately a question for the jury.

Results of Housing Authority Referrals — Dr. Krisberg reported that, of CAT referrals to the Housing Authority, African Americans were eventually terminated by the Housing Authority

[7] Defendant accuses Dr. Krisberg of violating the protective order in this case, an accusation raised for the first time in this brief. Opp. Brief at 25:6-10. Defendant provides no support for its claim, which is wholly without merit. Krisberg Supp. Decl. ¶ 53. If defendant in fact believes a violation has occurred, the appropriate remedy would be first to raise the matter with plaintiffs' counsel and, if unresolved, then bring a motion for violation of the protective order.

at lower rates than other Section 8 CAT referrals. Krisberg Decl. at 16–17. Defendant does not dispute that the statistical finding is accurate, again only what inference can be drawn from the numbers. Dr. Krisberg suggests that the police referred African Americans based on weaker evidence. *Id.* Defendant speculates instead that a Housing Authority hearing officer was intimidated by Bay Area Legal Aid, but provides no evidence to back up its claim. Which inference is more plausible is a merits question to be resolved by the jury; at the class certification stage, it is simply another common question of fact.

Presumption that All Are Equally Likely to Be Targeted — Defendant complains that Dr. Krisberg's analysis assumes that a Section 8 recipient is just as likely as a kindergarten teacher to be the focus of police activity. There is, however, no data to demonstrate that Antioch Section 8 recipients, as a group, are more likely to be tied to criminal activity than anyone else and defendant has specifically disclaimed any such association. Opp. Brief at 28:23-27. Moreover, the data shows that Section 8 properties that were designated as CAT locations were more likely to be in the lower crime areas of the city. Krisberg Decl. at 18. Notably, defendant's expert, Dr. Withrow, while critical of Dr. Krisberg, did not conduct his own analysis using what he argues is the correct analysis to prove that the results would be different. Larkin Supp. Decl. Ex. 1 (Withrow Dep. 85:25-86:8).[8] The criticism must therefore be rejected. *Hemmings v. Tidyman's Inc.,* 285 F.3d 1174, 1188 (9th Cir. 2002) ("defendant may not rest an attack [on statistical evidence] on an unsubstantiated assertion of error").

In any event, in an adverse impact analysis, the appropriate pool is those subjected to the challenged practice. Thus, for example, when an employment policy, such as a test, is challenged, the pool is test-takers. *Contreras v. City of Los Angeles,* 656 F.2d 1267, 1271 (9th Cir. 1981). The pool in such cases is not "random" – rather the pool reflects the policy. Thus, in this case, since Section 8 households are targeted, they are the appropriate pool for adverse impact analysis. Krisberg Supp. Decl. ¶¶ 4 -7.

[8] Dr. Withrow conceded in his deposition that he conducted no regression analysis and has no idea what the results would be if he did. Larkin Supp. Decl. Ex. 1 (Withrow Dep. 183:10–185:5).

1 Small Number of Affected Class Members – Defendant suggests that, in absolute
2 numbers, the disproportionate focus on African-American Section 8 holders really only amounts
3 to "39 African-Americans . . . subject to revocation hearings rather than a statistically expected
4 32." Opp. Brief at 23:26-28. (Again, we are unable to determine how this calculation was
5 done). In fact, Dr. Krisberg's analysis shows that, had Section 8 households been targeted as a
6 percentage of their representation among all households, 149 fewer households (representing 485
7 individuals) would not have been designated CAT locations. Krisberg Supp. Decl. ¶ 41.

8 **3. Antioch's Defenses Raise Additional Common Questions of Law and**
9 **Fact**

10 For purposes of Rule 23(a)(2) commonality, a party's defenses to a claim will also create
11 common questions of law or fact, when those defenses apply uniformly to all class members.
12 *See, e.g.*, *In re Computer Memories Securities Litigation*, 111 F.R.D. 675, 687 (N.D. Cal.1986).
13 Defendant appears to raise two class-wide "business necessity" defenses: that the police
14 department's practices were: 1) a response to "excessive calls for service;" and 2) a form of
15 community-oriented policing. The parties' experts address themselves largely to these matters.
16 We respond briefly to some of the points raised.

17 1. 'Excessive Calls for Service' Defense

18 Defendant asserts that CAT was established to respond to "excessive" calls for service
19 from certain locations and that its practice of targeting Section 8 recipients can be explained in
20 this way.[9] The problem with this defense is that not a single contemporaneous document
21 substantiates it. There is no record that this is the reason that city officials or the police
22 department set up CAT. Defendant claims that CAT reviewed, on a monthly basis, an analysis
23 of the locations with the highest number of calls for service to determine whether to create a
24 CAT file. Notably, not a single copy of this monthly report was produced in discovery nor does
25 defendant attest that any of the targeted Section 8 recipients were on this monthly list. Larkin
26
27 [9] Defendant has no policy or definition as to what "excessive" calls for service are. Larkin Supp. Decl. Ex. 1 (Withrow Dep. at 104:25–106:5).
28

Supp. Decl. Ex. 2 (Callanan Dep. 184:1-11) (admitting that he never saw any report of the top calls for service). In fact, an internal department document shows that, by late 2007, well over a year after the CAT was established, Sergeant Schwitters was still discussing with the crime analyst how she would develop such a report. The report said: "Working on a new program with Virginia that *will* show all addresses with excessive calls for service — monthly print out — more to follow." Dang Supp. Decl. Ex. B (*comparing* C.A.T. Monthly Reports July 2006—June 2008 *to* Schwitters Decl. at 5:9-13)

In fact, the only "data" that defendant offers is an analysis of calls for service that its expert, Dr. Withrow, conducted — an effort to justify *post hoc* the targeting of Section 8 recipients. Krisberg Supp. Decl. ¶ ¶ 8 - 25. Dr. Withrow's analysis calculated the average calls for service for *all* CAT locations, which included "outliers," like shopping malls and parks that had hundreds and hundreds of calls for service, artificially inflating the averages. He failed to control for Section 8 status despite the fact that he had the data to do so. Krisberg Supp. Decl. ¶ 18.

Dr. Krisberg, using the same data set, disaggregated the data to show separately calls for service at Section 8, other rental, owner-occupied and other locations (i.e. commercial and parks). He found that, before CAT was established, the number of calls for service to Section 8 properties was *below the average* for other Antioch residents. Even after CAT was formed, Section 8 locations had fewer calls for service than other CAT locations and did not have substantially more than the city average. Krisberg Supp. Decl. ¶ 21. Many Section 8 homes on the CAT list had only one or two calls for service. *Id. at* ¶ 19. Thus, plaintiffs have strong evidence that the "excessive calls for service" defense is without merit. The defense constitutes another question of fact and law common to the class.

2. <u>'Community Policing' Defense</u>

Defendant advances a second class-wide defense that CAT is a form of "community policing." Opp. Brief at 7:22–9:6.[10] It relies on the expert reports of Dr. Withrow, Chief

[10] Plaintiffs vigorously dispute that CAT practices were true community policing or that a "community policing" defense could ever satisfy a business necessity showing. That argument

1 Richard Word and Joseph Callanan, who vouch for the practices that CAT used.
2 As rebuttal, plaintiffs offer reports from experts Rana Sampson and Lorie A. Fridell.
3 Sampson, a former New York City police officer, is a nationally recognized expert in problem-
4 oriented policing, who regularly trains police officers. Based on her expertise, she provides
5 extensive criticisms of Dr. Withrow's opinion that the CAT practices are proper problem-
6 oriented policing, faulting the police department for failing to conduct a comprehensive analysis
7 of the top locations citywide for calls for service. *See* Sampson Decl., Ex. A at 4. In attacking
8 Ms. Sampson's opinion (Opp. Brief at 28), defendant contradicts its own expert, Joseph
9 Callanan, who agrees with Ms. Sampson both that such an analysis is common among police
10 departments (Larkin Supp. Decl., Ex. 2 at 182:14-25), and that Antioch did not conduct that
11 routine analysis. *Id*. at 184:1-11; 185:24-186:3; 187:16-20.
12 Ms. Fridell is an expert in racial profiling and bias in law enforcement and rebuts the
13 sweeping conclusions of the defense experts about the absence of discrimination in this case.[11]
14 She highlights the fallacy (accepted by all the defense experts) that racial bias will be explicitly
15 documented in police records and that its absence can be taken as proof that no illegal
16 discrimination has occurred. Fridell Decl. ¶¶ 8-9.
17 Defendant's chief criticism of Ms. Fridell and Ms. Sampson is that they did not read the
18 CAT files, while its experts did. Opp. Brief at 27:11–29:22. Because these experts were retained
19 as <u>rebuttal</u> witnesses, their purpose was to criticize the methods and conclusions of the defense
20 experts, which they very persuasively do. Reading individual CAT files, moreover, ignores the
21 forest (pattern and practice) and focuses solely on the individual trees. In any event, their
22 opinions hardly justify the vitriolic attack on them in the opposition brief. Opp. Brief at 29:8-11.
23 Experts regularly testify as to specialized knowledge in their areas of expertise, without
24 expressing an opinion about the specific facts of the case. Fed. R. Evid. 702 advisory
25
26 is, however, for another day.

[11] All three of Antioch's experts also provide the opinion that, based on their review of the
27 evidence, no illegal discrimination occurred. Because such opinions are impermissible under
Fed. R. Evid. 702, plaintiffs have concurrently moved to strike those portions of their opinions.
28

committee's note ("an expert . . . may give [an exposition of scientific] principles relevant to the case, leaving the trier of fact to apply them to the facts.") The community policing defense presents another common question supporting certification.

**4. Plaintiffs Have Demonstrated a Common Question Regarding Whether Defendant's Practice of Targeting Section 8 Recipients Was Intentional Race Discrimination**

Plaintiffs have also offered substantial evidence that defendant was motivated to target African-American Section 8 recipients based upon their race. This showing includes the statistical report of Dr. Krisberg; statistical evidence is one form of circumstantial evidence that may support a finding of intentional discrimination. *Teamsters,* 431 U.S. at 339. *See Village of Arlington Heights v. Metro. Housing Dev. Corp.,* 429 U.S. 252, 266(1977) (disparate impact is relevant evidence of discriminatory intent).

In addition to the evidence listed above in Sections II.B.1 & 2, plaintiffs have offered evidence that the city was aware of concerns about the racial impact of CAT and did not investigate. Opening Brief at 15:26-28; *see Dixon v. Margolis,* 765 F. Supp. 454, 460 & n.13 (N.D. Ill. 1991) (inaction by decision-makers who received statistical reports of adverse impact based on race probative of discriminatory intent). In addition, plaintiffs have provided evidence about the highly-charged public atmosphere in which the city decided to undertake its Section 8 targeting. *Innovative Health Systems, Inc. v. City of White Plains,* 117 F.3d 37, 49 (2d Cir. 1997) *superseded on other grounds by Zervos v. Verizon New York*, 252 F.3d 163, 171 n.7 (2d Cir. 2001) ("a decision made [by public officials] in the context of strong, discriminatory opposition becomes tainted with discriminatory intent even if the decisionmakers personally have no strong views on the matter"). This evidence includes the racially-coded statements by public officials in public meetings that they did not want Antioch to "become Richmond." Opening Brief at 3:21-4:2. While defendant works hard to convince the Court that such statements really were not about race, it ignores the deposition testimony of its former Police Chief who testified that he believed the remarks were stereotypes "directed at the Black community." Larkin Decl., Ex. 7

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(Moczulski Dep. 96:18 – 97:13.) [12]

Plaintiffs have also proffered the testimony of Riaz Patras, an Antioch landlord whom defendant admits received numerous calls and visits from CAT officers in an effort to get Ms. Scott evicted.[13] Mr. Patras testified to statements made by a CAT officer concerning problems with "black tenants." Defendant points to the fact that CAT officers provided assistance in connection with recalcitrant tenants. In fact, an audiotape of one such conversation provides compelling evidence of racial bias by CAT officers. After leaving the scene of an argument between Mr. Patras and a Section 8 tenant who he is trying to buy out, the officers discuss the incident:

> Officer Dillard: It makes me sick to my stomach, man. ***You can't even deal with her people anymore.*** She up there screamin' and hollerin' about how God's going to strike him down for being evil and all this kind of crap. Unfucking believable man. Makes me sick to my stomach. We ain't got shit done all morning either.
>
> …
>
> Officer Bittner: He shouldn't give her anything.
>
> Officer Dillard: Bro, that house is to' up. And it's costing him -- it's costing him $1300 to get her the fuck out of here.
>
> …
>
> Officer Dillard: ***I will never rent a Section 8 home, never. Never.***
>
> Officer Bittner: It is a nightmare.
>
> Officer Dillard: ***They know that if they sit here and act ghetto enough***, and scream and holler and yell enough, that decent reasonable people will finally give in and just go away. Or -- orcave in. And that's what's happening right now. ***And I feel sick***….

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[12] Antioch's dismissal of this testimony is reminiscent of a recent employment discrimination case in the U.S. Supreme Court case, *Ash v. Tyson,* 546 U.S. 454 (2006) (per curiam). The Eleventh Circuit reversed a jury verdict on behalf of two African American managers, holding that there was no discriminatory animus associated with a white supervisor referring to the men as "boy," unless it was preceded by the modifier, "black." The Supreme Court summarily reversed. "The speaker's meaning may depend on various factors including context, inflection, tone of voice, local custom, and historical usage." *Id.* at 456.

[13] Plaintiff Scott recounts a reference by a CAT officer to "you people," testimony that led Magistrate Spero to deny summary judgment on the Section 1983 claim in the *Tuggles v. City of Antioch* case. *See* Beatty Decl., No. 1, Ex. Y at 20:24–21:21.

Dang Supp. Decl. at ¶ 7 (emphasis added). While defendant may feel it has ammunition from his deposition to attack Mr. Patras at trial, it cannot easily explain the contents of its *own* audiotape. Opp. Brief at 21:7-24. Whether the jury ultimately believes Mr. Patras or Officer Bittner is a credibility issue that will be resolved at trial.[14]

Defendant also attempts to dispel the notion that race played a role in any of its conduct by offering the opinions of a handful of Antioch residents, many of whom were involved with UCBN or the Crime Prevention Commission, which publicly condemned Section 8 tenants whom they believed were undermining the city.[15] Opening Brief at 3, 5:13-26. Some of them are African American;[16] others attest that they have friends who are African American.[17] They affirm their support for CAT and their heartfelt opinion that neither they nor the police were motivated by racial bias.[18] The fact that some members of a protected group, particularly ones who are not members of the proposed class, do not perceive discrimination is not a reason to deny class certification to those who do. *Cf. Bremiller v. Cleveland Psychiatric Institute*, 898 F. Supp. 572, 577 (N.D.Ohio 1995) (class certification appropriate even though many of the potential class members have not come forward or are satisfied with the status quo).

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[14] The same is true for the testimony of Mia White, whom defendant has attacked.

[15] For example, Hans Ho, Chair of the Crime Prevention Commission, stated at a May 2008 Quality of Life forum: "*The terrorism exercised by these leeches of society* on good law-abiding citizens was no less real than the terror from Al Qaida." (emphasis added) Dang Supp. Decl., ¶ 2.

[16] Gilbert Decl. ¶ 1, McIlvenna Decl. ¶ 2, Archuleta Decl. ¶ 1. Roger Henry, who no longer holds his leadership position in the NAACP local chapter, claims that the chapter investigated and found no discrimination. Henry Decl. ¶¶ 4, 9. Mr. Henry's account is inaccurate in numerous respects. *See* Mims Rebuttal Declaration ¶¶ 2, 4-6, 10.

[17] Cross Decl. ¶¶ 1, 5 (boyfriend and neighbor who are African-American), Ho Decl. ¶ 6 (African-American friend).

[18] Suffused throughout defendant's brief is the notion that African Americans cannot or would not discriminate against other African Americans. The assumption is wrong as a legal matter. "Because of the many facets of human motivation, it would be unwise to presume as a matter of law that human beings of one definable group will not discriminate against other members of their group." *Castaneda v. Partida*, 430 U.S. 482, 499 (1977). It is also wrong as a matter of social psychology. Jerry Kang, Trojan Horses of Race, 118 Harv. L. Rev. 1489, 1493 (2005) (explaining that as a result of pervasive anti-Black bias, Blacks show the same levels of implicit biases against Blacks as do whites).

**F. Plaintiffs' Claims Are Typical of Those of the Class**

Defendant asserts the same objection to typicality as it did to commonality, *i.e*. that not every plaintiff experienced precisely the same treatment at the hands of the police. Opp. Brief at 35:12-15. The Ninth Circuit has held that "[u]nder the rule's permissive standards, representative claims are 'typical' if they are reasonably co-extensive with those of the absent class members; they need not be substantially identical." *Hanlon v. Chrysler Corp.*, 150 F.3d 1011, 1020 (9th Cir. 1998). Each of the named plaintiffs has established that she is an African-American Section 8 recipient who, while living in Antioch, was targeted by the CAT for excessive scrutiny and unwarranted referral to the Housing Authority, pursuant to defendant's standard policy. Opening Brief at 22:18-23:6.

Defendant does not dispute these basic facts, but nonetheless asserts that plaintiffs' claims are not typical of the class because they "verge on being frivolous." Opp. Brief at 35:16. "Disputes concerning the existence or amount of any damages a potential class representative suffered are more appropriately addressed at the merits stage." *In re Wal-Mart Stores, Inc. Wage and Hour Litigation,* 2008 WL 413749, at *11 (N.D. Cal. Feb. 13 2008); *see also* H. Newberg & A. Conte, Newberg on Class Actions §3.16 (4th ed. 2002) ("The class representative need not show a probability of success on the merits to maintain a class action.")

Defendant's brief includes inflammatory descriptions of the named plaintiffs and their interactions with the Antioch police, which plainly go to the merits of their claims and rely on disputed facts that will be decided by a jury. Like the rest of its brief, defendant's account contains no specific citations to support the allegations. Plaintiffs highlight some of the key misstatements.

Priscilla Bunton — Bunton has testified about two incidents in which APD officers entered and searched her home in violation of the Fourth Amendment. Defendant claims the September 26, 2006 incident began when the police arrived wishing to serve an arrest warrant on her boyfriend. Opp. Brief at 11. In fact, the real reason the police arrived that day was to discuss an alleged noise complaint about her son playing basketball after 7 p.m. Bunton Decl.¶¶ 5, 8. The officers then encountered her boyfriend and determined that he had a "cite and release"

1 warrant. Although defendant characterizes the incident as a "quick consent search," Bunton
2 testified that, without asking for consent, an officer walked passed her and entered her home, and
3 that when she asked for a warrant, the officer ignored her question. Bunton Decl. ¶ 6; Larkin
4 Supp. Decl. Ex. 3 (Bunton Dep. 45:8-18; 49:8-12. The officer conducted an extensive search
5 through her personal items in her drawers, closet and bathroom. Bunton Decl. ¶ 6; Larkin Supp.
6 Decl. Ex. 3 (Bunton Dep. 46:22-24). The police did not locate her boyfriend's identification,
7 contrary to the claims that it was quickly secured. Lastly, defendant fails to explain (or even
8 mention) why, the day after this incident, a CAT officer sent a letter to the Housing Authority
9 regarding Bunton even though, as defendant admits, she was fully cooperative. Bunton Decl.
10 ¶ 8; Larkin Supp. Decl., Ex. 4 (Bittner Dep. 197:10-23).
11 With respect to the November 2006 incident, characterized as a search under warrant,
12 Bunton explains that she was coerced into allowing officers to enter her home. Bunton Decl. ¶
13 11. In response to her request for a warrant, Bunton alleges that the officers threatened to call for
14 back-up if she did not allow them to search the home. *Id.*; Larkin Supp. Decl., Ex. 3 (Bunton
15 Dep. 23:1-4). Officers entered and searched her entire home, including her closets, garage and
16 backyard shed. Bunton Decl. ¶ 10; Larkin Supp. Decl., Ex. 4 (Bunton Dep. 38:7–24).
17 Defendant completely omits another incident in which Bunton woke up one morning to find
18 several officers in her front and back yards. Bunton Decl. ¶ 10; Larkin Supp. Decl., Ex. 4
19 (Bunton Dep. 38:7-24).
20 Santeya Williams — Defendant claims the police "offered [Ms. Williams] domestic
21 violence assistance." Opp. Brief at 14:4-5. While the Antioch police did respond to a domestic
22 violence call to her home, the officers' questioning of Ms. Williams (while she was still in pain)
23 as to whether she rented or owned her home, and how many complaints had been made about her
24 house, could hardly be considered offering her assistance. This was part of their subterfuge to
25 collect evidence to refer her to the Housing Authority for revocation. Williams Decl. at ¶ 9;
26 Larkin Supp. Decl., Ex. 5 (Williams Dep. at 69:16-71:4).
27 Defendant states: "Once an officer came to see how she was doing because Batieste was
28 reported to be there. She denied it, but invited the officer in to look for Batieste." Opp. Brief at

14:5-6. There are several errors and omissions here: (1) "once" was actually the day after the domestic violence incident; (2) there is no evidence that Mr. Batieste was "reported to be there"; (3) there were two officers, not one; and (4) Ms. Williams did not invite the officers in "to look for Batieste". She invited them into the doorway so she could speak with them. Her baby was upstairs, and she was wearing a nightgown. When they began searching her house, she specifically objected. The officers ignored her objections and carried out a warrantless search of her home. Mr. Batieste was not found in the home, confirming Ms. Williams' statements. Williams Decl. at ¶¶ 10-11.

Karen Coleman — Defendant's account of the June 20 search of the Coleman home is inaccurate. Officers did not come to the Coleman residence to serve a temporary restraining order sought by Mrs. Coleman. K. Coleman Decl. ¶17; Larkin Supp. Decl., Ex. 6 (Transcript of Bittner Visit to K. Coleman Residence 17:10-12).[19] Mr. Coleman never admitted that he had lived in the home for six months. While officers repeatedly asked both Mr. and Mrs. Coleman to admit this, neither did. *Id.* at 3:1-14, 10: 4-7; K. Coleman Decl. ¶ 18. CAT officers nonetheless went forward with their efforts to get Mrs. Coleman's housing voucher revoked by sending letters to the Housing Authority and her landlord. Police pursued these efforts even after they learned that Mr. Coleman had been added as a lawful resident to the lease. K. Coleman Decl., Ex. C & D. This is the core of Mrs. Coleman's claim, and defendant never addresses it. Defendant also mischaracterizes the reasons Mrs. Coleman asserts that CAT officers treated her differently because of her race. K. Coleman Decl. ¶¶ 6-7, 11, 15-21, 23-24.

Alyce Payne — Ms. Payne is a survivor of domestic violence and the overwhelming majority of calls for service by the Payne household have been for violence in the home. Despite that, CAT aggressively tried to terminate her Section 8 benefits by sending a letter to the Housing Authority which misapplied the law. Payne Decl., Ex. B. Moreover, CAT officers failed to disclose to the Housing Authority that she was a victim of domestic violence. Opening

[19] Defendant has, to date, filed two errata to its brief to correct erroneous facts, including this fact.

Brief at 10. In so doing, CAT disregarded the fact that, pursuant to the Violence Against Women Act, survivors of domestic violence may make claims for continued tenancy in public and Section 8 housing based on their status as a victim of domestic violence. 24 C.F.R. §§ 5.2003-5.2007. Without citation, the defense claims that Ms. Payne "illegally allowed [Mr. Shivers] to live with her." Opp. Brief at 11. Despite these allegations, the Housing Authority found that Ms. Payne was in fact in compliance and she continues to receive Section 8 assistance. Payne Decl., ¶ 13.

Mary Scott — Defendant contends that Scott "has no complaints with her interaction with the police." Opp. Brief 13:12–13. This statement is simply not true. Ms. Scott has testified that she felt the police forced their way into the house, unlawfully searched her house (and left it a mess), accused her of lying, and made comments suggesting they did not believe she deserved to live in the house. Scott Decl., ¶¶ 10, 13. One officer made a racist comment, referring to 'you people.' *Id.* at ¶ 11; Larkin Supp. Decl., Ex. 7 (Scott Dep. 197:12-23, 199:24-200:2). While Ms. Scott has admitted that she exaggerated to the police about Mr. Young's conduct, those statements were made in the aftermath of a heated physical altercation. Scott Decl., ¶ 9.[20]

### G. Plaintiffs and Their Counsel Are Adequate Class Representatives

Plaintiffs have demonstrated that they would be adequate class representatives and that their lawyers meet the requirements for appointment as class counsel. Opening Brief at 23, 25:9-23. Defendant does not dispute that these requirements are met.

### H. The Class is Appropriately Certified Under Rule 23(b)

*Rule 23(b)(2)* — Plaintiffs have demonstrated that the class can appropriately be certified under Rule 23(b)(2) because the plaintiffs seek primarily injunctive relief on behalf of the class. Opening Brief at 23-24. Defendant does not dispute that plaintiffs brought the suit primarily for that purpose. Instead, it argues that any injunctive relief would be based on "highly individualized adjudications of each member's claim." Opp. Brief at 36:12-13. To the contrary,

[20] Defendant provides a similar scattershot, citation-free recitation relevant to the anecdotal witnesses. Opp. Brief at 15–19. Plaintiffs do not attempt to rebut each assertion but refer the Court to their declarations filed with the opening brief.

plaintiffs have, in their prayer for relief, requested prospective relief in the form of changes to the policies and procedures of the Police Department that would address the practice of targeting at issue in this case, without regard to the circumstances of any individual. First Amended Complaint ¶148. *Kincaid,* 244 F.R.D. at 605 (rejecting contention that injunctive relief will vary among class members). That prayer does not include any request that the Court should bar parole searches. Opp. Brief 36:21–22.

Defendant renews its standing argument, asserting that Payne, who has not made a Fourth Amendment claim, lacks standing to obtain injunctive relief related to searches. As noted earlier, the class has standing to seek injunctive relief so long as one named plaintiff has standing. *Bates,* 511 F.3d at 985. Indisputably, the four other named plaintiffs allege search-related claims, and all five allege a practice of targeting Section 8 recipients who are African American. *See* Opening Brief at 22-23.

*Rule 23(b)(3)* — Defendant again argues that plaintiffs cannot demonstrate that common issues predominate over individual issues, unless a blanket policy is challenged. As argued *supra* at Section II.C., no such limitation exists on Rule 23 actions, and plaintiffs have presented evidence of a department-wide practice.

Finally, defendant argues that class treatment is not the superior method for adjudication because the class members can simply bring individual suits. Opp. Brief at 37. Proving an adverse impact claim is complex and expensive and it is unlikely that an individual could bring such an action.[21] Moreover, plaintiffs seek to represent a class who lack resources and may fear challenging law enforcement. *Cf. Kincaid,* 244 F.R.D. at 607 ("Given Plaintiffs' lack of education, resources, and social acceptance, class members [homeless individuals] are unlikely

[21] Defendant's only support for this contention is that one individual, Onita Tuggles, has initiated an individual suit. Opp. Brief at 37:19-20. Ironically, elsewhere in the brief, defendant highlights the same case to show that plaintiffs' case fails on the merits. Opp. Brief at 31:6-10. Ms. Tuggles' case illustrates why a class action is so important in these circumstances. She did not present admissible statistical analyses — perhaps because of a lack of resources — to support her allegations of disparate impact and some of her claims were dismissed on summary judgment. Beatty Decl., No. 1, Ex. Y at 17:4-18. In this case, by combining their claims, plaintiffs can demonstrate a pattern of conduct and marshal the resources to present persuasive statistical proof.

to institute separate suits."). In addition, individual lawsuits would not provide for broad injunctive relief to change the police department's practices, which is the primary goal of this case. *Zepeda v. I.N.S.*, 753 F.2d 719, 727-28 (9th Cir. 1984). Class treatment is plainly a superior method for adjudication on these facts.

## III. CONCLUSION

Plaintiffs have satisfied the requirements of Rule 23. Accordingly, the Court should certify the class as requested.

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