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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF IDAHO

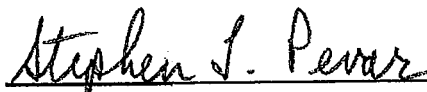
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|-----------------------|---|----------------------------|
| MARLIN RIGGS, et al, |) | Case No. 1:09-cv-00010-BLW |
| |) | |
| Plaintiffs, |) | PLAINTIFFS' RENEWED MOTION |
| |) | |
| vs. |) | FOR CLASS CERTIFICATION |
| |) | |
| PHILIP VALDEZ, et al, |) | |
| |) | |
| <u>Defendants.</u> |) | |

Plaintiffs respectfully move this Honorable Court to certify this case as a class action pursuant to Rule 23(a), (b)(2) of the Federal Rules of Civil Procedure, with the class consisting of all present and future prisoners of the Idaho Correctional Center (ICC) in Kuna, Idaho. *See* Plaintiffs' Second Amended Complaint (Dkt. 71) ¶ 3. This case satisfies all four requirements of Rule 23(a), in that (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 of the representative parties are typical of those of the class; and (4) the representative parties will fairly and adequately protect the interests of the class. Additionally, this case satisfies the requirements of Rule 23(b)(2), in that Defendants have acted or refused to act on grounds generally applicable to the class, thereby making appropriate final injunctive or corresponding declaratory relief with respect to the class as a whole.

WHEREFORE, Plaintiff requests that this case be certified as a class action pursuant to Rule 23(a) and (b)(2). A memorandum of law accompanies this motion.

DATED this 4th day of November, 2010.



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CERTIFICATE OF SERVICE

I hereby certify that on November 4, 2010, I electronically filed the foregoing Renewed Motion for Class Certification with the Clerk of Court using the CM/ECF system which sent a notice of electronic filing to the following persons:

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| MARLIN RIGGS, et al, |) | Case No. 1:09-cv-00010-BLW |
| |) | |
| Plaintiffs, |) | PLAINTIFFS' BRIEF IN SUPPORT |
| |) | |
| vs. |) | OF RENEWED MOTION FOR |
| |) | |
| PHILIP VALDEZ, et al, |) | CLASS CERTIFICATION |
| |) | |
| Defendants. |) | |

INTRODUCTION

The Court concluded in its Memorandum Decision and Order of October 18, 2010 (Dkt. 92) that named plaintiffs Andrew Ibarra, Ray Barrios, Joshua Kelly, Jose Pifia, and Randy Enzminger had exhausted their available administrative remedies and therefore may proceed with their individual claims for declaratory and injunctive relief against the

Defendants in this action. In addition, the Memorandum Decision states that these Plaintiffs "shall renew their motion for class certification, if any, on or before November 5, 2010." *See id.*, at 27. Plaintiffs hereby renew their motion for class certification pursuant to Rule 23(a), (b)(2) of the Federal Rules of Civil Procedure, and submit this brief in support.¹

Three points should be emphasized at the outset. First, the Supreme Court and the Ninth Circuit have recognized that cases exist in which Rule 23 issues "are plain enough from the pleadings' and do not require analysis beyond those papers. . . . Thus, in some cases, the pleadings will be sufficient to render the certification decision." *Dukes v. Wal-Mart Stores, Inc.*, 603 F.3d 571, 587 (9th Cir. 2010) (*en banc*), quoting *Gen. Tel. Co. of Southwest v. Falcon*, 457 U.S. 147, 160 (1982). "A district court need not *always* look beyond the complaint" before granting a Rule 23 motion. *Wang v. Chinese Daily News, Inc.*, 2010 WL 3733568 at *9 (9th Cir. 2010) (emphasis in original). For reasons explained below, the pleadings in the present case are "plain enough" to render the certification decision. Moreover, there exists considerable evidence in the record to support Plaintiffs' Rule 23 motion should the Court wish to look beyond the pleadings.

Second, "it is the plaintiff's *theory* that matters at the class certification stage, not whether the theory will ultimately succeed on the merits." *Dukes*, 603 F.3d at 587 (emphasis in original), citing *United Steelworkers v. ConocoPhillips Co.*, 593 F.3d 802, 808-09 (9th Cir. 2010). In other words, a district court will look to the commonality of the issues raised in the complaint--and not assess their likely success--to decide the Rule

¹Plaintiffs' first motion for class certification (Dkt. 29) was withdrawn--and proceedings in connection with it were vacated by the Court--after Plaintiffs notified the Defendants and the Court that Plaintiffs would be filing their Second Amended Complaint. *See* Docket 61 (Stipulated Status Report) and Docket Entry Order of June 2, 2010.

23 motion. *See Dukes* at 587 ("In short, we have consistently held that when considering how the facts and legal issues apply to a class under Rule 23(a), the district court must focus on common questions and common issues, not common proof or likely success on the questions commonly raised.") Here, as explained below, fourteen issues of law and fourteen core issues of fact raised by the representative Plaintiffs are common to the class. Given that class certification under Rule 23(a), (b)(2) is appropriate when just *one* issue of law *or* fact is common to the class, the existence of multiple common issues makes this case particularly appropriate for class certification. *See Dukes*, at 587.

Lastly, it should be noted that this Court has adjudicated numerous conditions of confinement cases similar to the instant case. (During the past three decades, the ACLU alone has filed more than a dozen such cases in this Court.) To Plaintiffs' knowledge, all of these cases proceeded as class actions under Rule 23(a), (b)(2). *See, e.g., Gomez v. Vernon*, Civ. No. 91-299-S-LMB (D. Idaho, Order dated Oct. 1, 1992); *Loya v. Board of County Commissioners of Bannock County, Idaho*, 1992 WL 176131 at *1 (D. Idaho 1992); *Balla v. Idaho State Board of Correction*, 595 F. Supp. 1558, 1561 (D. Idaho 1984). Similarly, the Ninth Circuit has repeatedly recognized that conditions of confinement litigation is appropriate for resolution as class actions. *See Pierce v. County of Orange*, 526 F.3d 1190, 1997-98 (9th Cir. 2008); *Mayweathers v. Newland*, 258 F.3d 930, 933-34 (9th Cir. 2001); *Toussaint v. Yockey*, 722 F.2d 1490, 1491 (9th Cir. 1984); *Hoptowit v. Ray*, 682 F.2d 1237, 1245 (9th Cir. 1982); *Leeds v. Watson*, 630 F.2d 674, 675 (9th Cir. 1980); *Inmates of San Diego County Jail v. Duffy*, 528 F.2d 954, 956-57 (9th Cir. 1975). Plaintiffs know of no prisoner litigation decided by this Court or by the Ninth Circuit raising systemic issues (as here) in which class certification was denied.

When Plaintiffs filed their first motion for class certification, Defendants requested the Court's *imprimatur* to engage in broad discovery regarding class certification issues. On May 19, 2010, the Court stated as follows regarding Defendants' request for such "wide-ranging" discovery:

At CCA Defendants' request, the Court will give the parties some leeway to conduct limited discovery on Rule 23 class certification issues. But the Court is not convinced by Defendants' argument that they need wide-ranging discovery, particularly given that all potential members of the class are prisoners at ICC, the putative class seeks injunctive and declaratory relief rather than monetary damages, and Defendants are presumably in possession of the bulk of the documents and records relevant to these issues. *See Dukes v. Wal-Mart Stores, Inc.*, 2010 WL 1644259 at * 16 (9th Cir. April 26, 2010) (noting that while a district court must perform a 'rigorous analysis' before certifying a class action, the court retains the discretion in appropriate cases 'to cut off discovery to avoid a mini-trial on the merits at the certification stage.')

See Order of May 19, 2010 (Dkt. 52) at 2. For reasons stated below, the Court would be acting well within its discretion in holding that the evidence already in the record--particularly the admissions made by Defendants in their Answer--is more than adequate to determine the Rule 23 motion. Indeed, it is unclear what evidence Defendants could introduce to militate against the certification of this case as a (b)(2) class, given the numerous common issues of law and fact raised by the pleadings. As the Ninth Circuit confirmed earlier this year, subsection (b)(2) was designed to permit "class members [to] complain of a pattern or practice that is generally applicable to the class as a whole," which is *precisely* the situation here. *See Rodriguez v. Hayes*, 591 F.3d 1105, 1125 (9th Cir. 2010) (quoting *Walters v. Reno*, 145 F.3d 1032, 1047 (9th Cir. 1998).)

Indeed, if Defendants renew their request for Rule 23 discovery, they should explain what evidence they could *possibly* obtain that would offset the averments in

Plaintiffs' Second Amended Complaint (SAC), not to mention Defendants' Answer to it. The SAC raises fourteen common core issues of law and fact. In their Answer, Defendants *concede* more than enough facts to justify class certification. As discussed below, Defendants concede that twenty-two prisoners listed in the SAC were involved in fights; only one of these fights was investigated to determine whether staff malfeasance occurred in connection with the fight; not a single staff member was disciplined in connection with any of these fights; and instead of investigating the presence of staff malfeasance, Disciplinary Offense Reports were issued on numerous occasions to everyone involved in the fight, including victims attacked by multiple prisoners. Defendants obtained all of this evidence from own files, and it is more than enough proof of common issues to justify the certification of a class action.

THE FOURTEEN COMMON CORE ISSUES OF FACT

Plaintiffs' SAC (Dkt. 71) seeks declaratory and injunctive relief pursuant to Rule 23(a), (b)(2) on behalf of all current and future prisoners of the Idaho Correctional Center (ICC) in Kuna, Idaho. The class does not seek damages. Rather, the class seeks equitable relief to halt fourteen policies and practices of the Defendants that, Plaintiffs contend, expose them to an unacceptably high risk of violent assault by other prisoners in violation of the Eighth Amendment. The defendants in this action include the persons and entities responsible for the operation and administration of ICC.²

²The defendants in this action include Corrections Corporation of America (CCA), the private corporation administering ICC pursuant to a contract with the Idaho Department of Corrections, and Phillip Valdez, the Warden of ICC. Two days after this lawsuit was filed, Valdez was relieved of his command by CCA. Valdez's departure does not impact Plaintiffs' claim for declaratory and injunctive relief against the warden of ICC, given that Valdez was sued in his official capacity. *See Kentucky v Graham*, 473 U.S. 159, 166 n.11 (1985) ("In an official-capacity action in federal court, death or replacement of the named official will result in automatic substitution of the official's successor in office. *See Fed.Rule Civ. Proc. 25(d)(1).*")

Listed below are the fourteen policies and practices challenged in this litigation under the Eighth Amendment. *All* of them are common to the men incarcerated at ICC.³ Also listed below is the evidence already in the record supporting these issues of fact.

1. Defendants have a policy and practice of placing prisoners at unnecessary risk of violent assault from other prisoners. See SAC ¶¶ 9, 25-485.

Evidence in support: (a) Defendants' Answer (Dkt. 80) to Plaintiffs' SAC concedes that twenty-two of the prisoners listed in the SAC were injured in physical assaults. See ¶¶ 53 (Todd Butters); 88 (Stock Cheever); 129 (Daniel Dixon); 142 (Hanni Elabed); 161 (Randy Enzminger); 184 (Philip Fenwick); 204 (Michael Hayes); 215 (Larry Hoak); 236 (Arthur Hoak); 260 (Antoney Jones); 287 (Clarence Knight); 310 (Spencer Maschek); 334 (James Parmer); 358 (Joe Rocha, Joshua Kelly, Andrew Ibarra); 400 (Marlin Riggs); 446 (Larry Sittner); 459 (Brian Spaude); 484 (Richard Williams).

(b) Todd Goertzen was a Unit Sergeant of three housing units at ICC containing some 260 prisoners from October 2007 through August 2009. As Unit Sergeant, Goertzen was responsible for maintaining prisoner and staff safety in those units. See Declaration of Todd Goertzen, attached as Exhibit 1, at ¶2. Goertzen's Declaration provides a detailed report of numerous dangerous deficiencies at ICC, one of which was the propensity of placing prisoners in housing units where their assault was likely. Goertzen states that there "was an excessive amount of prisoner violence at ICC and most of that violence could have been prevented by staff." *Id.* at ¶3-4.

³The SAC alleges that "ICC holds approximately 2000 prisoners." See SAC ¶ 37. CCA's website states that there are 2104 beds at ICC. See <http://www.correctionscorp.com/facility/idaho-correctional-center/>. Yet Defendants deny Plaintiffs' allegation, although they admit that ICC was designed to hold 1250 prisoners and that several housing units have been added since then. See Defendants' Answer (Dkt. 80) at ¶9. The precise number will have to be obtained in discovery, but even if ICC still housed only 1250 prisoners, this is more than enough for class certification, as explained below.

(c) Tammy McCall, a Correctional Officer at ICC from 2006-08, states in her affidavit, attached as Exhibit 2, that prisoners at ICC faced "unnecessary risk of assault" due to inadequate staffing, inadequate training, inadequate discipline of malfeasant staff, and "deliberately placing certain prisoners in a housing arrangement where they would likely be assaulted." *See* Exhibit 2 at ¶7.

(d) Sheri Hunsaker, a Correctional Officer and Case Manager at ICC from 2003-09, states in her affidavit, attached as Exhibit 3, that due to a combination of misguided policies and practices, there was "an enormous amount of prisoner-on-prisoner violence [and] most of that violence could have and should have been prevented by staff." *See* Exhibit 3 at ¶4. One dangerous policy was placing prisoners in housing locations "without any concern for their safety." *Id.* at ¶9.

2. Defendants have a policy and practice of failing to protect prisoners who request protection from imminent assault. *See* SAC ¶¶ 9, 49, 64-69, 82-87, 121-26, 141-42, 149-57, 177-81, 196-202, 210-13, 220-22, 226-34, 251, 57, 272-73, 299-307, 327-31, 357-62, 380-99.

Evidence in support: *See* Exhibit 1 at ¶8 (Goertzen testifies that he was instructed not to aid a prisoner at risk of imminent assault unless the prisoner agreed to become an informant); Exhibit 2 at ¶7 (McCall testifies that guards at ICC often refused to remove prisoners from dangerous situations); Exhibit 3 at ¶7 (Hunsaker testifies that guards "frequently ignored the pleas of prisoners to be moved from a dangerous environment. I witnessed prisoners crying with fear as they pleaded with correction officers to be placed in a safe environment, only to have their requests denied.")

In addition, Plaintiffs offer into evidence for purpose of the Rule 23 motion the compelling and sobering testimony of prisoner Harold W. Hockenbery.⁴ Mr. Hockenbery was an eye-witness to the assault on Plaintiff Marlin Riggs and overheard the entreaties that Mr. Riggs made to three different guards in an effort to avoid his imminent beating. *See* Deposition of Hockenbery at 46-48, attached as Exhibit 4. Indeed, after Riggs begged the guards to remove him from danger and they refused, Hockenbery heard one of these guards (Defendant Rose) advise other guards to "watch the cameras" because Riggs was sure to get assaulted as soon as he returned to his cell. *See id.* at 31-39.

3. Defendants have a policy and practice of failing to adequately investigate prisoner-on-prisoner assaults. *See* SAC ¶¶ 9, 27, 75, 95, 116, 132, 155, 170, 208, 219, 268, 279, 290, 296, 319, 350, 370, 422-23, 449, 459, 482.

Evidence in support: (a) Defendants concede that twenty-two men listed in the SAC were injured in fights but only one of these incidents was investigated. *See* Defendants' Answer ¶¶ 78 (Todd Butters); 98 (Stock Cheever); 119 (Steven H. Davis); 135 (Daniel Dixon); 158 (Randy Enzmingler); 167 (Randy Enzmingler); 187 (Philip Fenwick); 211 (Michael Hayes); 222 (Larry Hoak); 226 (Larry Hoak); 242 (Arthur Hoak); 271 (Antoney Jones); 282 (Matthew Knapp); 293 (Clarence Knight); 322 (Spencer Maschek); 353 (James Parmer); 373 (Jose Pina, Joe Rocha, Joshua Kelly, Ray Barrios, and Andrew Ibarra); 422, 434, 440 (Marlin Riggs); 452 (Larry Sittner); 462 (Brian Spaude); 480, 485 (Richard Williams).

(b) *See* Exhibit 1 at ¶10 (Goertzen testifies that investigations were rare and, when they did occur, it was to look for prisoner culpability, not staff malfeasance, and

⁴Mr. Hockenbery's testimony was taken because he is terminally ill and may not live long enough to appear at trial.

that ICC needed six investigators but only had one); Exhibit 2 at ¶7 (McCall testifies that ICC failed to adequately investigate prisoner assaults); Exhibit 3 at ¶14 (Hunsaker testifies that the only type of "investigation" that ever occurred at ICC during her six-year tenure was to determine if a prisoner violated the rules, never to determine whether staff malfeasance occurred).

4. Defendants have a policy and practice of failing to discipline the guards whose misconduct caused a prisoner-on-prisoner assault to occur. See SAC ¶¶ 9, 28, 76, 100, 117, 135, 167, 193, 209, 243, 269, 281, 291, 297, 322, 351, 371, 432, 448, 458.

Evidence in support: (a) Defendants concede that no employee was disciplined in connection with any assault detailed in the SAC. See Defendants' Answer ¶¶ 79 (Todd Butters); 103 (Stock Cheever); 120 (Steven H. Davis); 138 (Daniel Dixon); 170 (Randy Enzminger); 196 (Philip Fenwick); 212 (Michael Hayes); 227 (Larry Hoak); 246 (Arthur Hoak); 272 (Antoney Jones); 284 (Matthew Knapp); 294 (Clarence Knight); 325 (Spencer Maschek); 354 (James Parmer); 374 (Jose Pina, Joe Rocha, Joshua Kelly, Ray Barrios, Andrew Ibarra); 435 (Marlin Riggs); 451 (Larry Sittner); 461 (Brian Spaude).

(b) See Exhibit 1 at ¶5 (Goertzen testifies that guards routinely ridiculed prisoners and were not disciplined for fomenting violence); Exhibit 2 at ¶7 (McCall testifies that "supervisors fail[ed] to correct or discipline unprofessional conduct committed by officers."); Exhibit 3 at ¶11 (Hunsaker testifies that "the prevailing culture at ICC is to blame prisoners for all assaults, even when staff misconduct produced the assault.")

5. Defendants have a policy and practice of failing to assign an adequate number of staff to ICC, thereby placing prisoners at unnecessary risk of assault. See SAC ¶¶ 9, 10, 25, 51, 126, 143, 201, 259, 309, 424, 440, 462, 468-69.

Evidence in support: *See* Exhibit 1 at ¶4 (Goertzen testifies that guards were required to work 16-hour shifts three days in a row due to insufficient staffing, resulting in a dangerous environment); Exhibit 2 at ¶10 (McCall testifies that chronic understaffing placed prisoners at risk of being attacked and resulted in victims receiving more extensive injuries than would have occurred had staff been available to intervene); Exhibit 3 at ¶6 (Hunsaker testifies that inadequate staffing is a "main cause" of prisoner violence at ICC).

6. Defendants have a policy and practice of failing to adequately train guards in how to prevent prisoner-on-prisoner assaults. *See* SAC ¶¶ 9, 26, 139-144, 376-388, 427.

Evidence in support: *See* Exhibit 2 at ¶9 (McCall testifies that guards at ICC were inadequately trained, which created a "dangerous environment" for prisoners and staff); Exhibit 3 at ¶6 (Hunsaker testifies similarly).

7. Defendants have a policy and practice of maintaining a code of silence at ICC, inhibiting staff from reporting dangerous practices and staff malfeasance. *See* SAC ¶¶ 9, 32.

Evidence in support: *See* Exhibit 1 at ¶6 (Goertzen testifies that staff were discouraged from reporting misconduct committed by other staff "and there was an absolute code of silence at ICC." If an officer blew the whistle on misconduct, his or her life would become "unbearable.")

8. Defendants have a policy and practice of humiliating and degrading prisoners, thereby increasing the likelihood that prisoners will resort to violence. *See* SAC ¶¶ 14-15, 24, 154, 332, 389.

Evidence in support: *See* Exhibit 1 at ¶5; Exhibit 2 at ¶7; Exhibit 3 at ¶12 (Goertzen, McCall, and Hunsaker testify that prisoners were ridiculed and verbally abused by staff).

9. Defendants have a policy and practice of using violence and the threat of violence as a management tool. *See* SAC ¶¶ 9, 16-23, 389.

Evidence in support: *See* Exhibit 1 at ¶8 (Goertzen testifies that prisoners were told that unless they agreed to become an informant, they would be placed in a dangerous housing environment).

10. Defendant CCA has a policy and practice of underfunding ICC in order to increase its profits, even though this places prisoners at unnecessary risk of assault. *See id.* ¶¶ 9, 25-485.

Evidence in support: *See* Exhibit 1 at ¶¶4, 11 (Goertzen testifies that ICC was chronically understaffed and refused to undertake numerous corrective measures, and thus he believes "that ICC was more interested in making a profit than in reducing prisoner violence.")

11. Defendants have a policy and practice of failing to abate known causes of prisoner violence. *See* SAC ¶¶ 25-485.

Evidence in support: *See* Exhibits 1 at ¶¶3-10; Exhibit 2 at ¶¶7, 12, and 14; Exhibit 3 at ¶¶5, 9 (Goertzen, McCall, and Hunsaker describe numerous policies and practices that the warden and other staff knew were causing prisoner violence, and which they allowed to persist, such as berating prisoners, inadequate staffing, and deliberately placing prisoners in housing units where those prisoners faced a high risk of assault.)

12. Defendants have a policy and practice of rarely referring violent assaults to local prosecutors, thereby concealing the frequency of these assaults and encouraging additional assaults. See SAC ¶ 34.

13. Defendants have a policy and practice of maintaining ICC in an overcrowded situation, which foments violence and makes it impossible to place all prisoners in a safe environment. See SAC ¶¶ 34, 37, 44-485.

14. Defendants have a policy and practice of issuing Disciplinary Offense Reports (DORs) to the prisoners who were the *victims* of an assault, thereby shifting attention away from the guards whose misconduct caused the assault and placing it on the innocent victim. See SAC ¶¶ 33, 166, 320, 365-69, 410-12.

Evidence in support: See Exhibit 1 at ¶ 9 and Exhibit 2 at ¶10 (Goertzen and Hunsaker testify that they were instructed to issue DORs to all persons involved in a fight, even if it was clear that one of the prisoners was the victim of a planned attack). See also Deposition of Hockenbery at 50 (testifying that, based on his years of incarceration at ICC, guards have a policy of issuing DORs to the victims of assaults, and that one was issued to Plaintiff Riggs even though he clearly was the victim).

ARGUMENT

This case satisfies all the prerequisites for a Rule 23(a), (b)(2) class action.

1. Rule 23(a)(1): the class is so numerous that joinder of all members is impracticable.

More than 1000 prisoners are confined at ICC, and each one is similarly situated with respect to the fourteen policies and practices challenged in this lawsuit. That number is more than adequate to satisfy the "numerosity" requirement of 23(a)(1). Class

actions have been certified with far smaller classes. See *Leeds v. Watson*, 630 F.2d 674, 675 (9th Cir. 1980) (class action against the Kootenai County Jail); *Loya v. Board of County Commissioners of Bannock County, Idaho*, 1992 WL 176131 *1 (D. Idaho 1992) (certifying a class of some 135 prisoners in the Bannock County Jail). See also *Pierce v. County of Orange*, 526 F.3d 1190, 1997-98 (9th Cir. 2008) (class of pretrial detainees at county jail); *Inmates of San Diego County Jail v. Duffy*, 528 F.2d 954, 956-57 (9th Cir. 1975) (class of prisoners from one cellblock of county jail); *Consol. Rail Corp. v. Town of Hyde Park*, 47 F.3d 473, 483 (2d Cir. 1995) ("numerosity is presumed at a level of forty members"); *Jones v. Diamond*, 519 F.2d 1090, 1100 n.18 (5th Cir. 1975) (approving class of 48 prisoners).

Moreover, numerosity is satisfied in this case because the class includes persons who will become members in the future. As members *in futuro*, "they are necessarily unidentifiable, and therefore joinder is clearly impracticable." *Gomez v. Illinois State Bd. of Educ.*, 117 F.R.D. 394, 399 (N.D. Ill. 1987). See also *Jones v. Diamond*, 519 F.2d at 1100 (recognizing that when a class includes future members, a more generous application of the numerosity requirement applies). Accordingly, the fluid class of more than 1000 prisoners at ICC satisfies the numerosity requirement.

2. Rule 23(a)(2): there are questions of law and fact common to the class.

Subsection 23(a)(2) requires the presence of "questions of law or fact common to the class." (Emphasis added). This requirement must be construed "permissively." *Hanlon v. Chrysler Corp.*, 150 F.3d 1011, 1019 (9th Cir. 1998). A single common core question will suffice to permit class certification. "The commonality requirement is met if plaintiffs' grievances share a common question of law or fact." *Rodriguez v. Hayes*,

591 F.3d at 1122, quoting *Marisol A. v. Giuliani*, 126 F.3d 372, 376 (2d Cir. 1997). See also *J.B. ex rel. Hart v. Valdez*, 186 F.3d 1280, 1288 (10th Cir. 1999) (holding that subsection (a)(2) requires "only a single issue common to the class."); *Baby Neal for and by Kanter v. Casey*, 43 F.3d 48, 56 (3d Cir. 1994) ("The commonality requirement will be satisfied if the named plaintiffs share at least one question of fact or law with the grievances of the prospective class.") Here, as explained above, there are fourteen common core issues of fact. Moreover, there are fourteen common core issues of law, to wit, whether each of the fourteen policies and practices challenged in this action violate the Eighth Amendment. Thus, this case satisfies the "commonality" requirement.

In response to the first motion that Plaintiffs filed for class certification, Defendants questioned the propriety of a Rule 23 certification on the grounds that each prisoner assaulted would present a different set of underlying facts. This argument, however, misses the point. The relevant inquiry under Rule 23 is on whether a common issue of law or fact exists, and *not* whether factual differences also exist. See *Dukes*, 603 F.3d at 587 ("the commonality requirement ask[s] us to look only for some shared legal issue or a common core of facts.") (internal citation omitted). See also *Rodriguez v. Hayes*, 591 F.3d at 1122 (holding that it is permissible for members of the plaintiff class to have "divergent factual predicates" provided they share a common question of law, and they may have divergent questions of law provided they share common factual predicates). See also *Adamson v. Bowen*, 855 F.2d 668, 676 (10th Cir. 1988) (holding that a (b)(2) action challenging "a common policy" may be certified as a class action even though "the claims of individual class members may differ factually.") In *Dukes*, for instance, the Ninth Circuit affirmed a (b)(2) class consisting of 1.5 million female

employees working (or previously employed) at some 3,400 different Wal-Mart stores in a wide variety of jobs. *See Dukes*, 603 F.3d at 624-28.

All members of the class share a common interest in having this Court address all fourteen issues of law and fact, such as whether ICC is adequately staffed; whether Defendants have a duty to investigate prisoner assaults, and whether they are fulfilling that duty; whether the Defendants have a duty to discipline the guards whose misconduct resulted in prisoner violence, and whether the Defendants are fulfilling that duty; and whether Defendants are taking adequate steps to prevent unnecessary violence at ICC. Accordingly, this action satisfies the commonality requirement of 23(a)(2).

3. Rule 23(a)(3): the claims of the named plaintiffs are typical of those of the class.

The "commonality" requirement of subsection (a)(2) is similar to the "typicality" requirement of (a)(3). *See Marisol A.*, 126 F.3d at 376. The "typicality" requirement is met when the representative's claims arise from the same course of conduct and are based on the same legal theories as the claims of the class, even if factual differences exist amongst individual class members. *See Armstrong v. Davis*, 275 F.3d 849, 868 (9th Cir. 1991) (holding that the typicality requirement is satisfied when "each class member's claim arises from the same course of events, and each class member makes similar legal arguments to prove the defendant's liability."); *Dukes*, 603 F.3d at 613 (noting that "typicality" is satisfied when the class members suffered injury "through alleged common practices.") *See also Rodriguez*, 591 F.3d at 1194 (finding "typicality" despite factual differences where each member of the class was pursuing similar constitutional claims); *Inmates of the Attica Corr. Facility v. Rockefeller*, 453 F.2d 12, 24-25 (2d Cir. 1971) (finding "typicality" in lawsuit challenging excessive force by guards, despite individual

factual differences); *Bradley v. Harrelson*, 151 F.R.D. 422, 426 (M.D. Ala. 1993) ("there is no requirement that every class member be affected by the [prison] practice or condition in the same way.")

True, some prisoners at ICC were assaulted in J-Pod while others were assaulted in L-Pod; some suffered catastrophic injuries while others suffered minor injuries; some prisoners begged to be moved and were ignored, whereas others were blindsided when staff placed a violent prisoner near them. Regardless of these factual differences, the entire class asserts that the fourteen policies and practices cited above place them at risk of injury in violation of the Eighth Amendment. Here, as in *Rodriguez*, all members of the plaintiff class "raise similar constitutionally-based arguments." *Id.* 548 F.3d at 1124. Therefore, the "typicality" requirement is satisfied.⁵

4. Rule 23(a)(4): Plaintiffs will fairly and adequately protect the interests of the class.

Rule 23(a)(4) requires that "the representative parties will fairly and adequately protect the interests of the class." Satisfying this requirement depends on "the qualifications of counsel for the representatives, an absence of antagonism, a sharing of interests between representatives and absentees, and the unlikelihood that the suit is collusive." *Walters v. Reno*, 145 F.3d 1032, 1046 (9th Cir. 1998) (quoting *Crawford v. Honig*, 37 F.3d 485, 487 (9th Cir. 1994)). *See also Dukes*, 603 F.3d at 614. The plaintiff must show that "class counsel is qualified, experienced, and generally able to conduct the litigation,"

⁵Thus, as briefly mentioned earlier, given Plaintiffs' theory that fourteen common issues of law and fact exist in this case (and given that most of these theories already have compelling facts in the record supporting them), CCA must do more than argue in requesting Rule 23 discovery that factual *differences* may be uncovered through discovery. That is not the relevant question. CCA must show that discovery has a reasonable chance of proving that *not a single common question* of law or fact exists. That is an impossible burden given Defendants' Answer. Naturally, if at trial Plaintiffs only prove one common violation, they will be entitled to class-wide relief only with respect to it, but for purposes of adjudicating the present Rule 23 motion, the Court must focus on the theory and not the proof. *See Dukes*, at 587.

and that the overall interests of the class are not antagonistic to the interests of individual class members. *Marisol A.*, 126 F.3d at 378.

Here, all three attorneys representing the Plaintiff class are experienced litigators. Their average length of practicing law exceeds twenty-five years. Attorney Stephen Pevar has litigated more than seventy-five prisoners' rights cases; attorney Lea Cooper has litigated twelve prisoners' rights cases, as well as many other cases; and attorney James Huegli has vast civil litigation experience. Plaintiffs' attorneys are qualified, experienced, and capable of handling this litigation. Moreover, this action is not collusive. These attorneys know of no antagonism between the interests of the named representatives and the members of the class.

Plaintiffs' counsel can be counted on to pursue this case with vigor and determination, as they have done thus far. Accordingly, the "adequate protection" requirement of Rule 23(a) is satisfied.

5. The requirements of subsection (b)(2) are met.

Once a case is shown to satisfy the requirements of Rule 23(a), it must also satisfy one of the three subsections of 23(b). Here, the requirements of Rule 23(b)(2) are satisfied. Subsection (b)(2) provides for class certification when "the party opposing the class has acted or refused to act on grounds generally applicable to the class, thereby making appropriate final injunctive relief or corresponding declaratory relief with respect to the class as a whole."

Class certification is appropriate under subsection (b)(2) when "the primary relief sought is declaratory or injunctive." *Zinser v. Accufix Research Institute Inc.*, 253 F.3d 1180, 1195 (9th Cir. 2001). Certifying a case under subsection (b)(2) depends on

"whether class members seek uniform relief from a practice applicable to all of them." *Rodriguez*, 591 F.3d at 1125. *See also Walters*, 145 F.3d at 1047 (holding that (b)(2) is satisfied when "class members complain of a pattern or practice that is generally applicable to the class as a whole.") Indeed, as the court held in *Dukes*, 603 F.3d at 615-19, it is appropriate to certify a (b)(2) class seeking injunctive relief even where the class is also seeking damages (a level of factual complexity not present here).

The instant case is a "hornbook" (b)(2) case because all members of the class challenge of a pattern and practice--in fact, fourteen of them--generally applicable to the class as a whole. As noted earlier, both this Court and the Ninth Circuit have repeatedly certified prisoners' rights cases such as this one under subsection (b)(2). *See cases cited supra* at pages 3-4. *See also Clarkson v. Coughlin*, 783 F. Supp. 789, 797 (S.D.N.Y. 1992) (noting that class actions are "the norm" in prison suits seeking injunctive relief).

The Plaintiff class seeks broad declaratory and injunctive relief against the administrators of ICC. Paragraph 5 of the Prayer for Relief in Plaintiffs' SAC states:

5. Issue injunctive relief on behalf of Plaintiffs Pifia, Rocha, Ibarra, Kelly, Barrios, and Enzminger and on behalf of the class of prisoners they represent, pursuant to Rule 65 of the Federal Rules of Civil Procedure, ordering Defendants Valdez, Rodriguez, Danforth, Dean, Rose (and their successors, agents, and assigns) and CCA to take all reasonable steps to ensure that prisoners at ICC will be protected against unnecessary and preventable assault by other prisoners. Defendants should be ordered, among other things, (a) to hire an adequate number of staff; (b) to adequately train staff; (c) to adequately investigate each prisoner assault to determine whether it could have been prevented by staff and whether staff misconduct or malfeasance caused or contributed to the assault; (d) to issue adequate written findings, conclusions, and recommendations following each assault as to whether the assault could have been prevented; (e) to ensure that noncompliant or untrained staff will receive the discipline they deserve or additional training they need to prevent unnecessary violence at ICC; (f) to ensure that incident reports, documents, and logs are properly made and retained regarding incidents of prisoner assault; (g) to take all

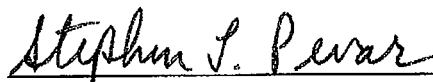
reasonable steps to eliminate the code of silence that pervades ICC; . . . (i) to expunge all references in prison files to DORs (regardless of their outcome) issued against prisoners, including the named plaintiffs, who were the victims of assault; (j) to report all assaults resulting in significant injury to local law enforcement officials, including those assaults that appear to be hate crimes; and (k) to ensure that all proposed housing moves of prisoners will be reviewed by the ICC Gang Coordinator prior to implementation; and (l) to ensure that ICC is not overcrowded.

Some members of the Plaintiff Class have not suffered physical injury--at least, not yet--as a result of the policies and practices challenged in this lawsuit. That fact is inconsequential to the Rule 23 inquiry, given that all members of the class are subject to those policies and practices and have the potential of being harmed by them. *See Rodriguez*, 591 F.3d at 1125 ("The fact that some class members may have suffered no injury or different injuries from the challenged practice does not prevent the class from meeting the requirements of Rule 23(b)(2). *Walters*, 145 F.3d at 1047.")

CONCLUSION

This case is a quintessential Rule 23(a), (b)(2) case. The plaintiff class is a large and fluid group, and each member of the class is similarly situated with respect to at least one--and, indeed, they are similarly situated with respect to all fourteen--policies and practices challenged in Plaintiffs' SAC. Accordingly, Plaintiffs respectfully request that the Court certify this case as a class action under Rule 23(a), (b)(2).

DATED this 4th day of November, 2010.




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Attorneys for the Plaintiffs

CERTIFICATE OF SERVICE

I hereby certify that on November 4, 2010, I electronically filed the foregoing Brief in Support of Plaintiffs' Renewed Motion for Class Certification with the Clerk of Court using the CM/ECF system, which sent a notice of electronic filing to the following persons:

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