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

LOUIS HENDERSON, DANA HARLEY, DARRELL ROBINSON, DWIGHT SMITH, ALBERT KNOX, JOHN HICKS, MELINDA WASHINGTON, DAVID SMITH and JAMES DOUGLAS,	)	
Plaintiffs,	)	
v.	)	**Civil Action No.: 2:11-CV-00224**
ROBERT BENTLEY, KIM THOMAS, BILLY MITCHEM, FRANK ALBRIGHT, BETTINA CARTER and EDWARD ELLINGTON,	)	
Defendants.	)	

DEFENDANTS' MOTION TO STAY OR, IN THE ALTERNATIVE, OPPOSITION TO PLAINTIFFS' MOTION FOR CLASS CERTIFICATION

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COME NOW, Defendants ROBERT BENTLEY ("Governor Bentley"), KIM THOMAS ("Mr. Thomas"), BILLY MITCHEM ("Mr. Mitchem"), FRANK ALBRIGHT ("Mr. Albright"), BETTINA CARTER ("Ms. Carter") and EDWARD ELLINGTON ("Mr. Ellington," or collectively with Governor Bentley, Mr. Thomas, Mr. Mitchem, Mr. Albright and Ms. Carter, the "State"), and submit their opposition to the Motion for Class Certification (Doc No. 2) filed by Plaintiffs LOUIS HENDERSON, DANA HARLEY, DARRELL ROBINSON, DWIGHT SMITH, ALBERT KNOX, JOHN HICKS, DAVID SMITH, JAMES DOUGLAS

and MELINDA WASHINGTON (the "Named Plaintiffs") with their Memorandum of Law in Support of Plaintiffs' Motion for Class Certification (Doc No. 3). In support of this Opposition, the State submits the following:

INTRODUCTION

Since the inception of this case, the Named Plaintiffs have pursued a collective rush to judgment. The Named Plaintiffs insist that the Court should simply ignore the extensive litigation culminating in the Onishea decision, which previously addressed the fundamental issues raised in this case, i.e. purported ADA violations arising from the incarceration of HIV-positive inmates in Alabama. The Named Plaintiffs also request that the Court take judicial notice of purported facts which are understandably disputed and not even subject to judicial notice. Now, the Named Plaintiffs request that the Court certify a class under Rule 23(a) and (b)(2) without even permitting the State discovery or the Named Plaintiffs satisfying their burden for class certification under Fed. R. Civ. P. 23. If the Named Plaintiffs had their way, this case would be filed, tried, decided and relief declared without addressing one procedural requirement, without presenting one piece of admissible evidence, completely setting aside their burden of proof, and suspending the State's procedural rights.

As discussed at length in the State's pending Motion to Dismiss, the Named Plaintiffs' First Amended Complaint avers a cursory set of allegations which fail to

satisfy the well-known pleading requirements. (See State's Memorandum of Law in Support of Motion to Dismiss, Doc. No. 35, at pp. 22-33). In similar fashion, the Named Plaintiffs seek certification of a purported class without conducting discovery or offering any evidence, while providing only a passing nod to the actual requirements of Fed. R. Civ. P. 23. When compared to the actual requirements of Rule 23, the Named Plaintiffs' Motion for Class Certification fails to approach the threshold of proof necessary to support such a request.

As discussed in greater detail below, the Named Plaintiffs' Motion for Class Certification fails for a variety of reasons, including the following:

(1) The State is entitled to discovery on the Named Plaintiffs' Motion for Class Certification;

(2) The Named Plaintiffs fail to establish the essential elements under Fed. R. Civ. P. 23(a);

(3) The Named Plaintiffs improperly rely upon the allegations in their pleadings alone as the basis for their request for class certification;

(4) The Named Plaintiffs improperly rely upon generic claims of "discrimination" defining the purported claims, rather than the actual claims asserted by the Named Plaintiffs;

(5) The Named Plaintiffs fail to demonstrate "numerosity" regarding the specific claims alleged in their First Amended Complaint;

(6) The claims asserted by the Named Plaintiff require individualized factual inquiries as opposed to class-wide proof;

(7) The Named Plaintiffs have not demonstrated any "nexus" between their claims and the purported claims of any putative class members, other than their common HIV conditions;

(8) The Named Plaintiffs fail to address apparent conflicts of interest between the Named Plaintiffs and other members of the putative class; and

(9) The Named Plaintiffs fail to adequately address their roles as representatives of the putative class.

For these reasons, the State respectfully requests that this Court deny the Plaintiffs' Motion for Class Certification in its entirety or, in the alternative, stay the Court's consideration of Plaintiffs' Motion for Class Certification until the State is afforded an adequate opportunity to conduct necessary discovery regarding the Named Plaintiffs' request for class certification.

PROCEDURAL HISTORY

The nine (9) Named Plaintiffs together with three (3) other individuals – all of whom are HIV-positive current and former inmates within the Alabama Department of Corrections ("ADOC") system – instituted this action on March 28, 2010. (Complaint, Doc. No. 1). Together with the Complaint, the Named Plaintiffs filed a Motion for Class Certification (Doc. No. 2) and a thirteen-page supporting Memorandum of Law (Doc. No. 3, collectively, with the Motion for Class Certification, the "Motion for Class Certification"). **The Named Plaintiffs did not submit any evidence or exhibits with their Motion for Class Certification, relying exclusively upon the allegations in their Motion for Class Certification**

and the original Complaint as the basis for certification of a class under Fed. R. Civ. P. 23. (See Motion for Class Certification, Doc. Nos. 2 and 3). According to the Motion for Class Certification, the Named Plaintiffs seek the certification of a class consisting of "all prisoners with HIV in the custody of the Alabama Department of Corrections, now and in the future." (Doc. No. 3, at p. 12).

The original Complaint identified three (3) former Plaintiffs, Roosevelt James, April Stagner and Ashley Dotson. (Doc. No. 1, pp. 1-10). In a notice dated April 11, 2011, former Plaintiffs Roosevelt James and April Stagner dismissed their claims based upon their release from the ADOC system. (Doc. Nos. 23 and 24). On May 11, 2011, former Plaintiff Ashley Dotson also dismissed her claims based upon her release. (Doc. No. 32). The remaining Named Plaintiffs filed the First Amended Complaint on May 11, 2011, reflecting the reduction in the total number of plaintiffs and removing the allegations related to the dismissed plaintiffs. (Doc. No. 31).

Like the original Complaint, the Named Plaintiffs' First Amended Complaint combines (a) a number of generic, cursory allegations lacking any reference to any specific facts regarding the treatment of HIV-positive inmates within the ADOC system, and (b) a small number of factual allegations related solely to the Named Plaintiffs. (Doc. No. 31). For example, the First Amended Complaint includes repeated references to one allegation – that the Named

Plaintiffs have been allegedly excluded from and/or denied the opportunity to participate in "ADOC services, programs, or activities," without any clarification or indication of the exact "services, programs or activities" which are the subject of the lawsuit. (See, e.g., First Amended Complaint). However, the allegations and requested relief specific to the Named Plaintiffs are markedly more detailed and can be summarized as follows:

ALLEGATIONS / REQUESTED RELIEF	INVOLVED NAMED PLAINTIFFS	PARAGRAPH CITATIONS[1]
Requesting transfer to Decatur Work Release	Henderson, Robinson, Dwight Smith, Douglas, David Smith	18, 21, 22, 26, 30, 32,
Requesting transfer to Another Facility with certain vocational programs or closer to "home"	Henderson, Robinson, Dwight Smith, Douglas, David Smith	19, 21, 27, 29, 32
Requesting transfer to Honor, Senior or Pre-Release Dorms	Henderson, Robinson, Knox, Dwight Smith, Douglas, David Smith	19, 21, 24, 27, 29, 32
Alleged Disparate Disciplinary Action	Knox, Harley, Washington	24, 33, 34, 73, 74
Exclusion from Food Services Positions	Hicks	23
Alleged Disclosure of HIV condition	Hicks, Harley	23, 33

Based, in part, upon these categories of claims as well as the cursory nature of the other allegations set forth in the First Amended Complaint, the State filed its Motion to Dismiss[2] and supporting Memorandum of Law on May 25, 2011. (Doc.

[1] These paragraph citations refer to the First Amended Complaint. (Doc. No. 31).

[2] Since the submission of the State's Motion to Dismiss and supporting Memorandum of Law, the Named Plaintiffs filed their Opposition (Doc. No. 37),

Nos. 34 and 35). However, as one of the primary bases for dismissal, the State raised the defense of *res judicata* based upon previously-filed actions which addressed the fundamental issues raised in the Named Plaintiffs' pleadings. (See id.).

The Court entered Orders dated July 11, 2011, setting the State's Motion to Dismiss for hearing on August 30, 2011, and directing the Named Plaintiffs to show cause why the State's Motion to Strike should not be granted. (Doc. No. 41). After the Named Plaintiffs filed a Motion for Clarification of the July 11, 2011, Order, the Court entered an Order dated July 15, 2011, directing the State to file any opposition to the Named Plaintiffs' Motion for Class Certification on or before August 1, 2011. (Doc. No. 44). As of the date of this Motion to Stay and Opposition, the State's Motion to Dismiss and the Named Plaintiffs' Motion for Class Certification are set before the Court for oral argument on September 16, 2011. (Doc. No. 45).

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which included certain purported evidence including an affidavit from one of the Named Plaintiffs' attorneys. The State moved to strike this evidence on July 8, 2011 (Doc. No. 40), at the same time the State filed its Reply Brief on the issues of dismissal. (Doc. No. 39).

NARRATIVE STATEMENT OF UNDISPUTED FACTS

The Named Plaintiffs' Motion for Class Certification relies upon allegations of facts, which bear little, if any, resemblance to reality. Rather than follow the Named Plaintiffs' approach of presenting hyperbole and supposition, the State submits the affidavits of (1) the ADOC's Assistant Director of Classification, Stephanie Atchison[3], (2) Limestone Correctional Facility Warden, Billy Mitchem[4], and (3) the ADOC's Associate Commissioner of Health Services, Ruth Naglich[5]. Through these affidavits, the State provides indisputable evidence demonstrating the misconstrued and incomplete factual pictures painted by the Named Plaintiffs' Motion for Class Certification. Additionally, these undisputed facts further demonstrate that the Named Plaintiffs have not identified any purported practice or policy which constitutes unlawful discrimination.

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[3] Ms. Atchison has been employed as the Assistant Director in the ADOC's Classification Division for more than three (3) years. (Affidavit of Stephanie Atchison ("Atchison Aff.") attached hereto as **Exhibit 1,** at ¶ 2). She has been employed in the ADOC's Classification Division for more than thirty-two (32) years during which time she has served in various capacities, including the following positions: Classification Specialists, Classification Specialist Supervisor, Central Review Board Analyst and Assistant Director of Classification. (Id.).

[4] Warden Mitchem has served as the ADOC's Warden III for Limestone Correctional Facility since 2001. (Affidavit of Warden Bill Mitchem ("Mitchem Aff.") attached hereto as **Exhibit 2,** at ¶ 2). Warden Mitchem has been employed with the ADOC for over thirty (30) years. (Id.).

[5] Ruth Naglich is currently employed as the ADOC's Associate Commissioner for Health Services and has been employed in this position since approximately October 4, 2004. (Affidavit of Ruth Naglich ("Naglich Aff.") attached hereto as

THE ADOC CLASSIFICATION PROCESS

The ADOC assigns a specific custody classification (or security classification) to each inmate within its custody. (Atchison Aff., at ¶ 3). The ADOC assigns custody classifications based upon a variety of factors, including, but not limited to: (a) an individual's criminal history, (b) past convictions, (c) past instances of escape or violence, (d) the time left remaining until the individual's release from custody and (e) the pendency of other unresolved criminal charges. (Id.). The ADOC Classification Division does not take into consideration whether an inmate has tested positive for HIV or AIDS in determining an inmate's custody classification. (Id.). In other words, each HIV-positive individual incarcerated within the ADOC system has been assigned a custody classification which does factor into where an HIV-positive inmate may be incarcerated during his or her incarceration. (Id.).

Exhibit 3, at ¶ 2). Naglich has worked in the area of correctional medicine for approximately twenty (20) years during which time she was also employed as a registered nurse for approximately four (4) years. (Id.). As the ADOC's Associate Commissioner for Health Services, Naglich is generally responsible for (a) overseeing the ADOC's medical staff which monitors the overall delivery of health care to inmates by the ADOC's private medical contractor, (b) adopting and/or enacting administrative policies and procedures related to the health care delivery system within the ADOC facilities, (c) overseeing the ADOC's compliance with legal and administrative requirements pertaining to health care and (d) monitoring the budgetary and financial aspects of the health care system within the ADOC facilities. (Id.).

All determinations related to the security classifications assigned to inmates by the Classification Division are highly individualized and fact-specific. (Atchison Aff., at ¶ 4). The classification process involves a variety of ADOC representatives, including individuals who work at each specific ADOC facility, and individuals employed at the ADOC's central office in Montgomery, Alabama. (Id.). For example, if any facility classification officer at any facility requests a significant alteration or change in any inmate's security classification (such as a change from minimum-out to minimum-community), such a request is submitted to the ADOC's Central Review Board. (Id.).

The Central Review Board is comprised of a number of individuals who are all authorized to review the request for a change in an individual's security classification. (Atchison Aff. at ¶ 4). In most instances, at least two (2) members of the Central Review Board must approve the alteration of an inmate's security classification. (Id.). This process for altering an inmate's security classification is highly subjective and requires members of the Central Review Board to undertake an analysis of circumstances surrounding each inmate on a case-by-case basis. (Id.).

INMATE TRANSFERS TO WORK RELEASE CENTERS

Only inmates classified as "minimum-out" or "minimum-community" are allowed transfer to a work release center or community work center. (Atchison

Aff., at ¶ 5). Inmates with the security classification of "minimum-out" are allowed to transfer to certain work release facilities or community work center within the State of Alabama; however, they are not eligible for participation in the work release programs, though they may be assigned to a supervised work squad which does leave the facility to conduct work outside of the facility. (Id.). Therefore, only inmates with a security classification of "minimum-community" are permitted to accept employment with a third-party employer through the ADOC's work release program. (Id.).

An inmate's security classification is only one factor considered in his or her assignment to a work release facility or community work center, though an individual's security classification can be determinative in some instances. (Atchison Aff., at ¶ 12). Even if an inmate is permitted to transfer to a work release facility or community work center pursuant to his or her security classification, there remain a number of other factors that also impact the ADOC's ability to transfer *any* inmate to a work release center or community work center. (Id.). First, the availability of work release housing positions is an immediate, primary threshold. (Id.). Availability is determined, in large part, upon the number of open or vacant beds. (Id.). In recent years, the ADOC leadership has encouraged members of the Classification Division to move eligible inmates as quickly as possible to open beds within the work release facilities. (Id.). Therefore,

the vacant or open beds within the work release facilities and community work centers are in high demand and are constantly in flux. (Id.). It is impossible to predict when any specific bed within any work release facility may become vacant because of the variety of reasons for these vacancies. (Id.). For example, a work release center may have an open bed because of a disciplinary infraction by an inmate who is transferred back to a higher security facility, because an inmate is granted parole and leaves the facility, or because an inmate qualifies unexpectedly for one of the various release programs which may or may not be managed by the ADOC. (Id.).

The decision to transfer an inmate to a work release facility is also based upon the needs of the various ADOC facilities, which often require reductions in population in order to accommodate incoming inmates. (Atchison Aff., at ¶ 12). While the ADOC does permit the transfer of qualifying HIV-positive inmates from Limestone Correctional Facility ("Limestone") to Decatur Work Release ("DWR") and from Tutwiler Prison for Women ("Tutwiler") to Montgomery Women's Center ("MWC") in certain defined instances, the transfer of these HIV-positive inmates is also subject to many of the same conditions, circumstances and restrictions, which often slow the movement of eligible non-HIV-positive inmates to these work release centers. (Id.). So, to the extent that there are ever inmates, including both HIV-positive and general population at Limestone, with a

"minimum-out" classification who have not been transferred to DWR, the delay in the assignment of these inmates to DWR is driven primarily by the limited availability of beds within DWR. (Id.).

NON-WORK RELEASE TRANSFERS

Inmates routinely request transfer to specific facilities for certain vocational programs (Atchison Aff., at ¶ 13). However, the transfer of an inmate to a particular facility with a certain type of vocational training program[6] is not guaranteed and a request for transfer to a particular facility will not be entertained if the inmate has any type of recent disciplinary activity. (Id.). This type of requested transfer may not be capable of accommodation depending upon a variety of factors, including the availability of beds, security considerations or other on-going issues that affect the transfer of inmates within the ADOC system. (Id.). Similar considerations are given to requests by inmates for transfer to a facility which is closer to their home or in close in proximity to their relatives. (Id.).

SECURITY CLASSIFICATIONS OF THE HIV-POSITIVE POPULATION

The HIV-positive inmates currently assigned to and housed at Limestone and Tutwiler have been assigned various security classifications ranging from

[6] Inmates who are serving a sentence of life without parole, regardless of their medical condition, are not permitted to enroll in any vocational training program offered by the ADOC unless they pay for such training in advance. (Mitchem Aff., at ¶ 6).

"medium" security to "minimum-out" security classifications. (Atchison Aff., at ¶ 5). Any inmate with a "medium" or "minimum-in" security classification is not eligible for transfer to any work release center or community work center, regardless of his or her medical condition. (Id.). As of August 1, 2011, approximately 150 HIV-positive inmates at Limestone are currently classified as either "medium" or "minimum-in" custody levels, meaning that these 150 HIV-positive inmates do not qualify for transfer to a work release facility or community work center. (Id.).

Furthermore, there are eleven (11) HIV-positive inmates incarcerated at Limestone who are serving a life sentence without the possibility of parole as of August 1, 2011. (Atchison Aff., at ¶ 8). None of these inmates are eligible for a transfer to a work release facility or community work center based solely upon their sentence. (Id.). Likewise, there are approximately 21 inmates at Limestone who have six (6) months or less remaining on their sentence and, therefore, these inmates are not currently eligible for transfer from Limestone due to the limited duration of their remaining sentence. (Id. at ¶ 9).

Additionally, there are no inmates housed at Limestone who have been classified as "minimum-community" who would qualify for the ADOC's work release program. (Atchison Aff., at ¶ 10). There are currently four (4) HIV-

positive inmates housed at DWR – three (3) of whom have a security classification of minimum-community and one (1) with a minimum-out classification. (Id.).

Tutwiler and MWC are the only two facilities where the ADOC currently houses female inmates with security classifications of minimum-in or higher, though a transfer to MWC does require medical clearance from the medical staff at Tutwiler (which is discussed in greater detail below). (Atchison Aff., at ¶ 11). MWC also houses female inmates who are classified as minimum-out and minimum-community and affords female inmates with the security classification of minimum-community with the opportunity to participate in the ADOC's work release program. (Id.). As of August 1, 2011, there are ten (10) HIV-positive female inmates at Tutwiler and one (1) HIV-positive female inmate classified as "minimum-out" at MWC. (Id.; see also Naglich Aff., at ¶ 3). The one (1) HIV positive female inmate at MWC is currently due to be released in six (6) days. (Id.).

THE ROLE OF MEDICAL COMPLIANCE IN HIV HOUSING

As a general matter, the ADOC requires any inmate with a chronic medical condition (such as HIV or diabetes) who transfers to a work release facility to demonstrate some level of medication compliance prior to their transfer. (Naglich Aff., at ¶ 5). This general requirement applies to all inmates with any chronic medical condition. (Id.). For example, any insulin-dependent diabetic must

demonstrate his or her compliance with his or her insulin injections in order to be eligible for transfer to a work release facility. (Id.). Those diabetic inmates who cannot demonstrate compliance with their treatment regimen are necessarily required to remain at the non-work release facilities with access to a full medical staff in order to ensure that they receive necessary medical attention for their poorly controlled conditions. (Id.). In addition, all inmates must demonstrate the ability to be responsible individuals in managing all aspects of their health care, including following the instructions and ordered treatments of the licensed medical professional who is acting as their primary care giver. (Id.).

Considering the importance of medical compliance with the directives and treatment plan provided to HIV-positive inmates by the HIV specialist at Limestone and Tutwiler (not to mention, the sheer cost[7] of the antiretroviral medications utilized in the treatment of HIV), it is imperative that HIV-positive inmates who receive HIV-related treatment demonstrate some level of compliance prior to their transfers to a work release facility. (Id.). While the ADOC has

[7] Over the course of the past year, the ADOC has expended approximately $6,500,000.00 on medications specific to treat HIV individuals, which is the leading medical expense associated with this condition. (Naglich Aff., at ¶ 4). This substantial cost is associated only with pharmaceuticals to treat HIV and does not include all of the additional associated health care cost of treating all medical and mental health needs of these HIV-positive individuals. (Id.). Ultimately, the ADOC expends approximately $25,000.00 per HIV-positive inmate receiving these medications per year. (Id.).

outlined certain medical compliance-related requirements for the transfer of HIV-positive inmates to work release facilities, ADOC personnel do not evaluate HIV-positive inmates for compliance with these requirements. (Id.). Any decisions relative to an HIV-positive inmate's medical fitness and responsiveness to treatment, in evaluating their eligibility for transfer to a work release facility, is determined solely and exclusively by the medical professional who is employed through the private contractor providing medical services to the HIV-positive inmates. (Id.).

THE NAMED PLAINTIFFS' INDIVIDUAL CIRCUMSTANCES

In the First Amended Complaint, four (4) of the Named Plaintiffs (Louis Henderson, Darrell Robinson, Dwight Smith and James Douglas) assert allegations related to specific circumstances involving their alleged entitlement to a transfer. (First Amended Complaint, Doc. No. 31, at ¶¶ 17, 22, 26, 30). However, these Named Plaintiffs' characterizations of their circumstances are erroneous.

First, Named Plaintiffs Louis Henderson and Dwight Smith make certain erroneous allegations relative to their security classifications. Named Plaintiff Louis Henderson, an HIV-positive inmate at Limestone, has been cleared by the medical staff for housing at a work release center. (Atchison Aff., at ¶ 6). However, Plaintiff Henderson has been assigned a security classification of "minimum-in." (Id.). Despite requests from the classification personnel at

Limestone for Plaintiff Henderson to be reclassified as "minimum-out," he remains classified as "minimum-in" because Plaintiff Henderson was previously involved in an escape incident involving physical force, which necessarily prevents his security classification to be reduced to minimum-out. (Id.). In other words, Plaintiff Henderson's current security classification has nothing to do with his HIV-status, but is based entirely upon his criminal history and, more specifically, his prior involvement in an attempted escape. (Id.).

Plaintiff Dwight Smith is also an HIV-positive inmate at Limestone. (Atchison Aff. at ¶ 7). As of June 8, 2011, the Limestone medical staff cleared Plaintiff Dwight Smith for housing at a work release facility and Plaintiff Dwight Smith received a recommendation from Limestone Classification to be reclassified as "minimum community." (Id.). However, the Central Review Board declined to approve Plaintiff Dwight Smith for transfer to a work release facility because of his history of escapes and length of time (approximately twenty years) remaining on his sentence. (Id.). Therefore, the Central Review Board has instead recommended that Plaintiff Dwight Smith remain classified as "minimum out," which precludes him from participating in work release. (Id.).

Second, Named Plaintiffs Darrell Robinson and James Douglas make certain erroneous allegations relative to their medical clearance for housing at a work release facility or community work center. Plaintiff Robinson suggests that the

ADOC will not transfer him to DWR because he is not currently receiving HIV-related medications. (First Amended Complaint, Doc. No. 31, at ¶ 22). This is not accurate. Plaintiff Robinson has undergone certain lab testing which revealed a CD4 count of 424 as well as a viral load count of 7161. (Naglich Aff., at ¶ 7 and Exhibit B thereto). These test results are attached to Ruth Naglich's Affidavit as Exhibit B. (Id.). These results indicate that Plaintiff Robinson has been routinely non-compliant with the instructions provided to him by the Limestone medical staff. (Id.). Plaintiff Robinson's medical records also confirm that he continues to smoke cigarettes and is making no attempt to maintain a healthy body weight, both of which will continue to compromise not only his HIV condition, but also his general health. (Id.). In sum, Plaintiff Robinson's viral loads have been rising and his CD4 counts have been dropping over the last twelve (12) months, compromising his immune system and overall health, and making him susceptible to PCP pneumonia and other AIDS-defining conditions and their associated sequelae. (Id.).

To make matters worse, Plaintiff Robinson continues to refuse medical visits with the HIV specialists at Limestone. (Id.). As recently as July 14, 2011, Plaintiff Robinson walked out during his medical visit with the HIV specialist. (Id.). Plaintiff Robinson also refused to see the HIV specialist during a scheduled visit on March 11, 2011. (Id.).

In the First Amended Complaint, Plaintiff Douglas erroneously asserts that he "was medically cleared from work release." (First Amended Complaint, Doc. No. 31, at ¶ 30). As indicated in the physician's notes from Plaintiff Douglas's January 5, 2011 appointment, Plaintiff Douglas has routinely been non-compliant with the direct recommendations of his licensed provider in taking responsibility for his overall health and medical treatment. (Naglich Aff., at ¶ 6 and Exhibit A thereto). The medical staff has committed to continue to review Plaintiff Douglas' medical condition in order to determine his eligibility for transfer to a work release center, but until Plaintiff Douglas demonstrates some level of compliance with the treatment plan provided to him, it does not appear that he will satisfy the minimum requirements for a transfer. (Id.). For these reasons, Plaintiff Douglas has not been "medically cleared."

Lastly, Plaintiff John Hicks brought this action while he was incarcerated at DWR. (First Amended Complaint, Doc. No. 31, at ¶ 23). However, Plaintiff Hicks is no longer in the custody of the Alabama Department of Corrections. (Atchison Aff., at ¶ 14). According to paragraph 31 of the First Amended Complaint, Plaintiff David Smith will also be released this month (i.e. August 28, 2011).

HOUSING AT LIMESTONE CORRECTIONAL FACILITY

To a large extent, the current circumstances surrounding the housing of HIV-positive inmates at Limestone are the result of requests made by the HIV-positive inmates to the Limestone correctional staff during the course of the Leatherwood class action.[8] (Mitchem Aff., at ¶ 3). For example, prior to the Leatherwood class action, HIV-positive inmates were housed in the building at Limestone which now houses the Honor Dorm. (Id.). Within the Honor Dorm building, inmates are assigned to bunks in an open housing area as opposed to the individual cells that exist in other buildings. (Id.). In response to a request by HIV-positive inmates involved in Leatherwood, the ADOC agreed to move the HIV-positive inmates from the current Honor Dorm at Limestone to their current location in Dorms B and C, which are commonly referred to as the "Special Unit." (Id.). Dorms B and C are nearly identical in their configuration and consist of individual cells which include two bunk beds and a toilet, a large two-story open gathering area (including a television viewing area), a nurses' station and showering facilities. (Id.).

[8] As the Warden at Limestone, Warden Mitchem has been involved in a number of lawsuits related to the housing of HIV-positive inmates at Limestone, including the lawsuit known as the "Leatherwood class action." (Mitchem Aff., at ¶ 3). The style of the Leatherwood class action was Antonio Leatherwood, *et al*. v. Donal Campbell, *et al.*, In the United States District Court for the Northern District of Alabama, Western Division, No. CV02-BE-2812-W.

As part of the Leatherwood class action, the Limestone correctional staff was specifically requested to remove beds from the gathering areas in Dorms B and C and agreed to do so. (Mitchem Aff., at ¶ 3). Since that time, the general gathering areas within Dorms B and C have not been utilized for additional bedding. (Id.). However, due to housing needs within the other dorms at Limestone, the general dormitories (specifically, Dorms I, J, K and L) have beds located within their gathering areas. (Id.). Therefore, Dorms B and C, which house the HIV-positive inmates, are much less crowded than the general population dormitories. (Id.). Likewise, the dormitories that house the Honor Dorm, Substance Abuse Program and Pre-Release participants do not have individual private cells, but rather consist of large open dormitories with rows of bunk beds and community toilets. (Id.). Therefore, the inmates housed in Dorms B and C, i.e. all HIV-positive inmates, have a greater deal of privacy than those inmates housed in the Honor Dorm, Pre-Release Dorm and the general population dorms. (Id.). In fact, the only dorms at Limestone with a comparable degree of privacy constitute the segregation, house arrest and senior dorms. (Id.).

As part of the Leatherwood class action and the recommendations and directions provided by the court-monitor employed in that case, inmates housed in the Special Unit at Limestone do receive considerably more food at each meal than a non-HIV-positive inmate housed in general population who does not have any

other medical condition requiring a special diet. (Mitchem Aff., at ¶ 4). Therefore, in order to accommodate the requested diet for HIV-positive inmates, in addition to other logistical needs of the facility, the Limestone correctional staff elected to serve those inmates their meals in their dormitories. (Id.). Because the HIV-positive inmates at Limestone receive their meals in their own dorms, they do not experience the wait time for receiving meals that other inmates experience who are housed in other dormitories in Limestone. (Id.).

The HIV-positive inmates at Limestone are expected to follow the same rules and regulations imposed upon the general population inmates. (Mitchem Aff., at ¶ 5). In January of 2010, Named Plaintiff Albert Knox entered the main chow hall at Limestone and attempted to receive his meal at this location. (Id.). Plaintiff Knox did receive a disciplinary citation because he entered the Limestone chow hall without authorization. (Id.). As an individual incarcerated in Limestone's Special Unit, Plaintiff Knox was required to receive his meals in the Special Unit Dorm. (Id.). The disciplinary action taken with respect to Plaintiff Knox was not taken due to his HIV-status, but was taken because of his violation of ADOC's regulations, which mandate the areas in which inmates may visit and receive meals. (Id.). For example, ADOC regulations prohibit an inmate housed in a general population dormitory from entering any other general population dormitory other than his own. (Id.). So, if a general population inmate had attempted to

receive a meal in the Honor Dorm, the Pre-Release Dorm, or at the time that another general population dormitory was being served lunch, this inmate would also receive a disciplinary citation. (Id.).

According to Warden Mitchem, many HIV-positive inmates housed in Limestone's Special Unit, i.e. Dorms B and C, receive benefits and have living conditions which exceed in many respects the conditions within the other housing units at Limestone. (Mitchem Aff., at ¶ 8).

ARGUMENT

I. THE NAMED PLAINTIFFS' MOTION FOR CLASS CERTIFICATION IS PREMATURE.

In the hurried presentation of their Motion for Class Certification, the Named Plaintiffs ignored their well-settled burden of proving their alleged entitlement to class certification. The indisputable evidence submitted by the State demonstrates that the broad, cursory and often inaccurate allegations asserted by the Named Plaintiffs hardly provide this Court with any basis to certify a class of inmate plaintiffs. The Named Plaintiffs oppose discovery because they likely know the detrimental impact discovery will have upon their requested class certification. Nevertheless, to the extent that the Court is inclined to fully consider the merits of the Named Plaintiffs' Motion for Class Certification, the State cannot provide the type of thorough response usually expected in these instances because the State has not been afforded any discovery in this action. Indeed, the State firmly believes that discovery will only provide the State with additional evidence bolstering the arguments included in this Opposition. Therefore, a stay of proceedings regarding class certification is appropriate until discovery on the class-related issues occurs.

A. THIS COURT HAS BROAD DISCRETION TO STAY CLASS CERTIFICATION PROCEEDINGS PENDING THE OUTCOME OF A MOTION TO DISMISS.

It has long been recognized that "[t]he power to stay proceedings is incidental to the power inherent in every court to control the disposition of the causes on its docket with economy of time and effort for itself, for counsel, and for litigants." Landis v. N. Am. Co., 299 U.S. 248 (1936); In re Colonial BancGroup, Inc. Sec. Litig., 2010 WL 119290, at *1 (M.D. Ala. Jan. 7, 2010) (Thompson, J.) ("Consequently, a stay may be authorized simply as a means of controlling the district court's docket and of managing cases before the district court.") (internal quotations omitted). As the Eleventh Circuit has held, a district court may exercise such authority in order to "consider the merits of the claims *before* their amenability to class certification." Telfair v. First Union Mortg. Corp., 216 F.3d 1333, 1343 (11th Cir. 2000) (emphasis added). Such an exercise of discretion is warranted because "[w]ith no meritorious claims, certification of those claims as a class action is moot." Id.

Although Rule 23(c)(1) of the Federal Rules of Civil Procedure requires this Court to decide the issue of class certification "as soon as practicable," it is well established that a motion to dismiss may be considered *prior* to ruling on a motion for class certification. See, e.g., Smith v. Network Solutions, Inc., 135 F. Supp. 2d 1159, 1165 (N.D. Ala. 2001) (finding it appropriate to address the defendants'

motion to dismiss prior to addressing the issue of the plaintiff's motion for class certification); Thornton v. Mercantile Stores Co., 13 F. Supp. 2d 1282, 1289-90 (M.D. Ala. 1998) (noting that there may be times when the court determines it is appropriate to rule on a dispositive motion before ruling on a motion for class certification); Mitchell v. Indus. Credit Corp., 898 F. Supp. 1518, 1537 (M.D. Ala. 1995) ("At the outset of this case, the court expressed its concern over the extensive discovery, time and expense that would likely be involved on the class certification issue, and the court finds it reasonable to rule on the motions for summary judgment without deciding on class certification."); Shepherd v. Pilgrim's Pride Corp., 2007 WL 781883, at *2 (N.D. Ga. Mar. 12, 2007) ("The court finds that there is sufficient doubt regarding the likelihood of success on the merits of Plaintiffs' claims so as to justify addressing the matter prior to addressing class certification."); Tapken v. Brown, 1992 WL 178984, at *12 (S.D. Fla. Mar. 13, 1992) ("First, we address (1) the motions to dismiss and (2) the motions for summary judgment *before* considering (3) the motion for class certification, since the former may be dispositive.") (emphasis added).[9] This is particularly true

[9] Federal Courts outside of the Eleventh Circuit have also adopted these principles. See, e.g., Greenlee County, Ariz. v. United States, 487 F.3d 871, 880-81 (Fed. Cir. 2007) ("[W]e have repeatedly found on appeal that issues related to class certification were moot in light of our resolution against the plaintiff of a motion to dismiss or for summary judgment."); Curtin v. United Airlines, Inc., 275 F.3d 88, 93 (D.C. Cir. 2001) ("[W]here the merits of the plaintiffs claims can be readily resolved on summary judgment, where the defendant seeks an early disposition of

"where there is sufficient doubt regarding the likelihood of success on the merits of a plaintiff's claims, where inefficiency would result, or where neither plaintiffs nor members of the putative class would be prejudiced. . . ." Thornton, 13 F. Supp. 2d at 1289 (internal citations omitted). Moreover, this Court has noted that where a defendant seeks judgment on a dispositive motion in a class action lawsuit, the defendant assumes the risk that other plaintiffs will enter the case and not be bound by that judgment and, "it is not for the plaintiffs or the court to deter them from assuming that risk." Id.

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those claims, and where the plaintiffs are not prejudiced thereby, a district court does not abuse its discretion by resolving the merits before considering the question of class certification."); Cowen v. Bank United of Tex., FSB, 70 F.3d 937, 941 (7th Cir. 1995) ("It is true that Rule 23(c) of the civil rules requires certification as soon as practicable, which will usually be before the case is ripe for summary judgment. But 'usually' is not 'always,' and 'practicable' allows for wiggle room."); Thompson v. County of Medina, Ohio, 29 F.3d 238, 241 (6th Cir. 1994) (holding that the district court was correct in deciding a motion for summary judgment before a motion for class certification); Player v. Maher Terminals, Inc., 841 F.2d 1123 (4th Cir. 1988) (district court ruled on motion to dismiss before the class had been certified); Christensen v. Kiewit-Murdock Inv. Corp., 815 F.2d 206, 214 (2d Cir. 1987) (concluding that the district court did not err in reserving decision on the plaintiffs' class certification motion pending disposition of defendants' motions to dismiss); Floyd v. Bowen, 833 F.2d 529, 534-35 (5th Cir. 1987) (noting that the rule in several circuits is that class action litigation may be halted by a Rule 12 motion to dismiss or a Rule 56 motion for summary judgment); Wright v. Schock, 742 F.2d 541, 543-44 (9th Cir. 1984) ("Under the proper circumstances—where it is more practicable to do so and where the parties will not suffer significant prejudice—the district court has discretion to rule on a motion for summary judgment before it decides the certification issue.").

Applying these principles, the State asks this Court to exercise its broad discretion to stay the class certification proceedings in order to promote judicial economy and preserve the parties' resources while not prejudicing the Named Plaintiffs. The State's Motion to Dismiss, which turns on a purely legal issue, can dispose of this entire civil action. If the State prevails on its pending Motion to Dismiss, the Court's decision would moot the Named Plaintiffs' Motion for Class Certification and obviate the need for costly and time-consuming discovery that will necessarily follow if the Named Plaintiffs proceed at this time with their efforts to certify a class.

Moreover, the Named Plaintiffs propose the certification of a single class consisting of:

> Approximately 260 prisoners in ADOC custody who have been diagnosed by ADOC with HIV. . . . Plaintiffs bring this action on behalf of themselves and other similarly situated prisoners, seeking declaratory and injunctive relief under Title II of the Americans with Disabilities Act of 1990 ("ADA"), 42 U.S.C. § 12101 et seq., and Section 504 of the Rehabilitation Act, 29 U.S.C. § 794.

(Motion for Class Certification, Doc. No. 2, at p. 5). Because the Named Plaintiffs purport to define the class by general reference to the causes of action asserted in the original Complaint, it would be inefficient to address class certification before determining whether the Complaint in fact states causes of action under the ADA and Rehabilitation Act. Therefore, to the extent that the Court elects to consider

class certification at this stage of these proceedings, discovery is an appropriate and necessary next step.

B. THE STATE CANNOT PROVIDE A COMPLETE RESPONSE REGARDING CLASS CERTIFICATION WITHOUT CONDUCTING NECESSARY DISCOVERY.

Even if this Court elects to rule on the Motion for Class Certification before ruling on the State's Motion to Dismiss, the State is still entitled to conduct limited discovery on the issue of class certification. At this point, a dispositive Motion to Dismiss is pending and the parties in this case have yet to initiate a Rule 26(f)(1) conference to discuss any necessary discovery. The Federal Rules of Civil Procedure make it clear that "[a] party may not seek discovery from any source *before* the parties have conferred as required by Rule 26(f) . . . ." Fed. R. Civ. P. 26(d)(1) (emphasis added). Absent the benefit of having conducted any discovery on the class certification issue, this Court should either: (1) first rule on the State's Motion to Dismiss before the parties incur any unnecessary expense in conducting discovery; or (2) allow the State to conduct sufficient discovery limited to the class certification issue *before* ruling on the Motion for Class Certification.

1. The State's Motion to Dismiss should be decided before any discovery commences.

According to the Eleventh Circuit, "[m]atters pertaining to discovery are committed to the sound discretion of the court . . . ." Patterson v. U.S. Postal

Service, 901 F.2d 927, 929 (11th Cir. 1990) (finding no abuse of discretion where the district court stayed discovery pending the outcome of a motion to dismiss); see also Scroggins v. Air Cargo, Inc., 534 F.2d 1124, 1133 (5th Cir. 1976) ("We have constantly emphasized the broad discretion which a district judge may properly exercise in discovery matters."). In Chudasama v. Mazda Motor Corp., 123 F.3d 1353 (11th Cir. 1997), the Eleventh Circuit held that "[f]ailure to consider and rule on significant pretrial motions *before* issuing dispositive orders can be an abuse of discretion." Id. at 1367 (emphasis added). The Court reasoned that "[f]acial challenges to the legal sufficiency of a claim or defense, such as a motion to dismiss based on failure to state a claim for relief, should . . . be resolved before discovery begins." Id. In doing so, the Eleventh Circuit explained that, because a motion to dismiss "always presents a purely legal question; there are no issues of fact because the allegations contained in the pleading are presumed to be true. Therefore, neither the parties nor the court have any need for discovery before the court rules on the motion." Id. (citations omitted).

The Chudasama Court also examined the litany of burdens and expenses that discovery places on not only the parties, but also the court, which may be avoided by a court's ruling on a motion to dismiss:

> Discovery imposes several costs on the litigant from whom discovery is sought. These burdens include the time spent searching for and compiling relevant documents; the time, expense, and aggravation of

> preparing for and attending depositions; the costs of copying and shipping documents; and the attorneys' fees generated in interpreting discovery requests, drafting responses to interrogatories and coordinating responses to production requests, advising the client as to which documents should be disclosed and which ones withheld, and determining whether certain information is privileged. . . . Both parties incur costs related to the delay discovery imposes on reaching the merits of the case. Finally, discovery imposes burdens on the judicial system; scarce judicial resources must be diverted from other cases to resolve discovery disputes.
>
> If the district court dismisses a nonmeritorious claim before discovery has begun, unnecessary costs to the litigants and to the court system can be avoided. Conversely, delaying ruling on a motion to dismiss such a claim until after the parties complete discovery encourages abusive discovery and, if the court ultimately dismisses the claim, imposes unnecessary costs. For these reasons, any legally unsupported claim that would unduly enlarge the scope of discovery should be eliminated before the discovery stage, if possible. **Allowing a case to proceed through the pretrial processes with an invalid claim that increases the costs of the case does nothing but waste the resources of the litigants in the action before the court, delay resolution of disputes between other litigants, squander scarce judicial resources, and damage the integrity and the public's perception of the federal judicial system.**

Id. at 1367-68 (emphasis added) (footnotes omitted). Thus, ruling on a motion to dismiss as a threshold matter reduces the risk of abusive discovery.

The rationale for staying discovery pending a dispositive motion to dismiss is particularly appropriate in a purported class action, such as this case. In a class

action, every claim for relief significantly enlarges the scope of discovery. See Cotton v. Mass. Mut. Life Ins. Co., 402 F.3d 1267, 1292 (11th Cir. 2005); see also J&G Invs., LLC v. Fineline Props., Inc., No. 5:06 CV 2461, 2007 WL 928642, at *5 (N.D. Ohio Mar. 27, 2007) ("It makes sense to stay discovery in a class action pending resolution of motions to dismiss which might resolve the entire case."). The burden that discovery will place on the parties and this Court in this case will be significant. Additionally, the State's Motion to Dismiss, which turns on a purely legal issue, can dispose of this entire civil action. As a result, the State's Motion to Dismiss should be decided before the start of discovery.

2. The State is entitled to discovery on the issue of class certification before this Court rules on the pending Motion for Class Certification.

If this Court decides to reserve its ruling on the pending Motion to Dismiss until after deciding the Motion for Class Certification, the State is entitled to conduct discovery in order to adequately brief the issue of class certification. The Eleventh Circuit has held that "[a]lthough the issue of class certification should be resolved in the early stages of a case if possible, *prior discovery* is often necessary to sufficiently define the proper scope of an alleged class or subclass." Hudson v. Delta Air Lines, Inc., 90 F.3d 451, 458 n.16 (11th Cir. 1996) (emphasis added); Washington v. Brown & Williamson Tobacco Corp., 959 F.2d 1566, 1570-71 (11th Cir. 1992) ("To make early class determination practicable and to best serve

the ends of fairness and efficiency, courts may allow classwide discovery on the certification issue and postpone classwide discovery on the merits."). In ruling on a motion for class certification, courts are "not limited solely to the substance of the parties' pleadings." Rhodes v. Cracker Barrel Old Country Store, Inc., 213 F.R.D. 619, 673 (N.D. Ga. 2003) (citing Washington, 959 F.2d at 1570-71). Instead, courts "should allow . . . the parties to conduct discovery and adduce evidence relevant to the class certification issue." Id. (citing Washington, 959 F.2d at 1570-71). To certify the purported HIV-positive prisoner class in this case would be entirely premature, as the State has not had an opportunity to conduct discovery on the class certification issue. See Bais Yaakov of Spring Valley v. Peterson's Nelnet, LLC, No. 11-0011, 2011 WL 1458779, at *2 (D.N.J. Apr. 15, 2011) ("[I]t would be premature for this Court to decide the class certification issue on a motion to dismiss, prior to any discovery."). Accordingly, the State respectfully requests this Court to allow the parties to conduct limited discovery on the issue of class certification in order to adequately brief and argue the Motion for Class Certification.

II. THE NAMED PLAINTIFFS ARE NOT ENTITLED TO CERTIFICATION OF ANY CLASS UNDER FED. R. CIV. P. 23.

While discovery is necessary for the State to provide a complete response to issues raised in the pending Motion for Class Certification, it is evident from the

Named Plaintiffs' submissions that they have not satisfied the requirements of Fed. R. Civ. P. 23 for class certification. There are, of course, well-established principles that guide and direct this Court's evaluation of the class certification issue. "The class-action device was designed as 'an exception to the usual rule that litigation is conducted by and on behalf of the individual named parties only.'" General Telephone Co. of Sw. v. Falcon, 457 U.S. 147, 155 (1982) (other citations omitted). Given the exceptional nature of the class action, the drafters of the 2003 Amendments to Rule 23 encouraged courts in the Rule's Advisory Comments: "[a] court that is not satisfied that the requirements of Rule 23 have been met should refuse certification until they have been met."[10] Given the exceptional authority vested in the courts to make Rule 23 class determinations, the Eleventh Circuit encourages courts to conduct a "rigorous analysis of the rule 23 prerequisites before certifying a class." Sacred Heart Health Sys., Inc. v. Humana Military Healthcare, Inc., 601 F.3d 1159, 1169 (11th Cir. 2010) (quoting Vega v. T-Mobile USA, Inc., 564 F.3d 1256, 1266 (11th Cir. 2009); see also Walker v. Jim Dandy Co., 747 F.2d 1360, 1362-63 (11th Cir. 1984). As discussed below, the Named Plaintiffs' attempted justifications for class certification are haphazard and half-

[10] Conditional class certifications are no longer permitted under revised Rule 23. Advisory Committee Notes to 2003 Amendments to Rule 23(c)(1), FED. R. CIV. P. ("The provision that a class certification 'may be conditional' is deleted.")

hearted, not even approaching the threshold of proof necessary to justify the invocation of this procedural mechanism.

A. THE BURDEN UNDER RULE 23(A) RESTS SOLELY WITH THE NAMED PLAINTIFFS.

It is well-settled that the Named Plaintiffs are not entitled to certification of any class until they satisfy "all the requirements of Fed. R. Civ. P. 23(a) and at least one of the alternative requirements of Rule 23(b)." Jackson v. Motel 6 Multipurpose, Inc., 130 F.3d 999, 1005 (11th Cir. 1997). The burden of proof falls squarely upon the Named Plaintiffs to satisfy all the Rule 23 requirements for class certification. Zeidman v. J. Ray McDermott & Co., Inc., 651 F.2d 1030, 1038 (5th Cir. Unit A July 1981) ("A plaintiff who seeks to certify his suit as a class action under Federal Rule of Civil Procedure 23 must establish a number of specific prerequisites, and in each case the burden of proof is on the plaintiff who seeks to thus certify his suit."); Valley Drug Co. v. Geneva Pharm., Inc., 350 F.3d 1181, 1187 (11th Cir. 2003) ("The burden of proof to establish the propriety of class certification rests with the advocate of the class."); Heaven v. Trust Co. Bank, 118 F.3d 735, 737 (11th Cir. 1997) ("The burden of establishing these [Rule 23] requirements is on the plaintiff who seeks to certify the suit as a class action."); Sikes v. Teleline, Inc., 281 F.3d 1350, 1359 (11th Cir. 2002) (same).

While the burden under Rule 23 clearly rests with the Named Plaintiffs, the manner in which they must satisfy this burden is also clearly established. See, e.g.,

Morrison v. Booth, 763 F.2d 1366 (11th Cir. 1985). The Named Plaintiffs' failure to present any proof beyond the mere allegations of their pleadings is fatal. Stated differently, Rule 23 requires more than mere allegations. Id. at 1371. In fact, "the parties' pleadings alone are often not sufficient to establish whether class certification is proper, and the district court will need to go beyond the pleadings and permit some discovery and/or an evidentiary hearing to determine whether a class may be certified." Mills v. Foremost Ins. Co., 511 F. 3d 1300, 1309 (11th Cir. 2008) (relying upon Falcon, 457 U.S. at 160). In Grayson v. K Mart Corp., which also involved allegations of class-wide discrimination, the Eleventh Circuit instructed that the plaintiffs could meet their burden if they submitted "detailed allegations supported by affidavits . . . ." 79 F.3d 1086, 1097 (11th Cir. 1996) (relying upon Sperling v. Hoffman-La Roche, Inc., 118 F.R.D. 392, 406-07 (11th Cir. 1988). Furthermore, the class certification inquiry and the aspects of proof is specific, not generic. According to the Eleventh Circuit, "each claim must be analyzed separately, and a claim cannot be asserted on behalf of a class unless at least one named plaintiff has suffered the injury that gives rise to that claim." Griffin v. Dugger, 823 F.2d 1476, 1483 (11th Cir. 1987); see also Prado–Steiman v. Bush, 221 F.3d 1266, 1280 (11th Cir. 2000) (same). In other words, absent proof that one of the Named Plaintiffs has asserted a valid claim for relief against the State, their Motion for Class Certification necessarily fails.

In this instance, the Court need look no further than the Named Plaintiffs' Motion for Class Certification to see the deficiencies. The Named Plaintiffs seek class certification based upon the allegations set forth in their First Amended Complaint and Memorandum of Law in Support of their Motion for Class Certification. According to the former Fifth Circuit's opinion in Huff v. N. D. Cass Co. of Alabama, the absence of any evidence to support this critical type of ruling is unusual. 485 F.2d 710, 713 (5th Cir. 1973) ("[t]he determination usually should be predicated on more information than the complaint itself affords.") Unlike Grayson, the Named Plaintiffs in this action have submitted neither "detailed allegations" nor "affidavits." (See Motion for Class Certification, Doc. Nos. 2 and 3). Therefore, without considering the specific elements for class certification, it is evident that the Named Plaintiffs' Motion for Class Certification fails due to their exclusive reliance upon mere allegations, not admissible evidence.[11]

B. THE NAMED PLAINTIFFS FAILED TO MEET THEIR BURDEN UNDER RULE 23(A).

Rule 23(a) of the Federal Rules of Civil Procedure states:

> One or more members of a class may sue or be sued as representative parties on behalf of all only if (1) the class is so numerous that joinder of all members is impracticable, (2) there are questions of law or fact

[11] The current briefing schedule set by the Court (Doc. No. 44) does not contemplate any further submission by the Named Plaintiffs.

> common to the class, (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class, and (4) the representative parties will fairly and adequately protect the interests of the class.

See Valley Drug Co., 350 F.3d at 1187-88 (holding, "[u]nder Rule 23(a), every putative class first must satisfy the prerequisites of 'numerosity, commonality, typicality, and adequacy of representation.'"); see also Klay v. Humana, Inc., 382 F.3d 1241, 1250 (11th Cir. 2004) (same). As written by the Supreme Court in Falcon, "[t]hese four requirements . . . are designed to effectively limit class claims to those 'fairly encompassed' by the named plaintiffs' individual claims." 457 U.S. at 156, 102 S.Ct. at 2370 (citation omitted). More importantly, the failure of proof on any one of these requirements necessarily requires the denial of any request for class certification. Valley Drug, 350 F.3d at 1188. Indeed, the Named Plaintiffs' Motion for Class Certification fails to satisfy almost every aspect of Rule 23's requirements.

1. The Named Plaintiffs' argument regarding "numerosity" ignores the realities of their claims.

The Named Plaintiffs must first establish that "the class is so numerous that joinder of all members is impracticable." Fed. R. Civ. P. 23(a)(1). With respect to this first element of Rule 23(a)'s class requirements, the Eleventh Circuit notes, "a plaintiff still bears the burden of making some showing, affording the district court

the means to make a supported factual finding, that the class actually certified meets the numerosity requirement." Vega, 564 F. 3d at 1267. In Vega, the plaintiff attempted to satisfy the numerosity requirement through citation to "deposition testimony." Id. In considering the Vega plaintiff's request for class certification, the Eleventh Circuit reiterated that "mere allegations of numerosity are insufficient to meet this prerequisite." Id. While the Named Plaintiffs need not establish the "precise number of members in the class," they have failed to provide this court with any "showing, affording [this] court the means to make a supported factual finding, that the class actually certified meets the numerosity requirement."[12] See id.; see also Forehand v. Fla. State Hosp. at Chattahoochee, 89 F.3d 1562, 1566 (11th Cir. 1996) (decertifying a class upon realizing that the original Title VII class was only based upon a "rough estimate" of impacted employees).

In the context of the numerosity requirement, Falcon mandates that evaluation of the number of class members is limited to those individuals who possess claims "'fairly encompassed' by the named plaintiffs' individual claims." 457 U.S. at 156. More directly, the relevant inquiry involves the number of class members who assert claims for which "at least one named plaintiff has suffered the

[12] The Middle District of Florida has gone as far as requiring putative class representatives to file a "memorandum [in support of a motion for class certification that contains] a detailed description of the class, including the number of class members." Gonzalez v. Asset Acceptance, LLC, 308 F. App'x 429, 430 (11th Cir. 2009).

injury that gives rise to that claim." Griffin v. Dugger, 823 F.2d 1476, 1483 (11th Cir. 1987). Therefore, we must rely upon the contents of the Named Plaintiffs' First Amended Complaint for purposes of considering the number of individuals who assert claims raised by the individual Named Plaintiffs.

The Named Plaintiffs' First Amended Complaint does identify certain alleged acts[13] of discrimination for which "at least one named plaintiff" claims to have suffered injury. However, the putative class members likely affected by such alleged acts are limited. They are not numerous. As stated above, the ascertainable allegations of discrimination and/or relief sought by the Named Plaintiffs are as follows:

[13] As raised in the State's Motion to Dismiss, the Named Plaintiffs' First Amended Complaint does contain a variety of cursory, non-descript allegations from which the State cannot ascertain the exact extent of their claims. For example, the Named Plaintiffs repeatedly refer generically to "programs." (See First Amended Complaint, Doc. No. 31). Because these allegations are so non-descript, the State cannot respond nor can it even remotely evaluate whether the alleged denial of "programs" is a claim posited for purposes of the putative class. Therefore, to the extent that the Named Plaintiffs seek certification of a class based upon these generic claims, such claims are necessarily due to be dismissed under the Twombly standard. (See State's Memorandum of Law in Support of Motion to Dismiss, Doc. No. 35, at pp. 22-33).

ALLEGATIONS / REQUESTED RELIEF	INVOLVED NAMED PLAINTIFFS	PARAGRAPH CITATIONS
Requesting transfer to Decatur Work Release	Henderson, Robinson, Dwight Smith, Douglas, David Smith	18, 21, 22, 26, 30, 32
Requesting transfer to Another Facility with certain vocational programs or closer to "home"	Henderson, Robinson, Dwight Smith, Douglas, David Smith	19, 21, 27, 29, 32
Requesting transfer to Honor, Senior or Pre-Release Dorms	Henderson, Robinson, Knox, Dwight Smith, Douglas, David Smith	19, 21, 24, 27, 29, 32
Alleged Disparate Disciplinary Action	Knox, Harley, Washington	24, 33, 34, 73, 74
Exclusion from Food Services Positions	Hicks	23
Alleged Disclosure of HIV condition	Hicks, Harley	23, 33

Hence, the burden falls upon the Named Plaintiffs to satisfy the numerosity requirement with respect to each category of claims.

Rather than focusing upon the numerosity of the putative class members for each category of the purported claims, the Named Plaintiffs resort to a generic discussion. The Named Plaintiffs rely heavily upon the notion of "an unknown number of future members" as justifying the purported class. (Motion for Class Certification at pp. 4-5). The Named Plaintiffs also point generally to the "approximately 260 current prisoners with HIV in ADOC custody." (Id.). In the proposed Order attached to their Motion for Class Certification, the Named Plaintiffs attempt to define the purported class as including "all prisoners diagnosed with [HIV] in the custody of the [ADOC], now and in the future." (Doc.

No. 2-1). However, the Named Plaintiffs' all encompassing definition of the purported class is wholly improper.

All of the HIV-inmates incarcerated at Limestone, currently and in the future, are not eligible for transfer to DWR and, therefore, cannot be members of any purported class. As set forth in the Affidavit of Stephanie Atchison, the specific security classifications of the HIV-population can be generally summarized as follows:

HIV-INMATE SECURITY CLASSIFICATIONS (AS OF AUGUST 1, 2011)	
Classification Category	**Number of Inmates**
Medium / Minimum-In (LCF)	150
Life Without Parole (LCF)	11
Less Than 6 Months Remaining (LCF)	21
Minimum-Out (DWR)	1
Minimum-Community (DWR)	3
Medium / Minimum-In (Tutwiler)	10
Minimum-Out (MWC)	1

(Atchison Aff., at ¶¶ 5, 10, 11). As indicated through this table, the most "numerous" category of HIV-positive inmates (i.e. the 150 medium and minimum-in inmates with HIV at Limestone) are not even eligible for work release. (Id.). More specifically, at least two (2) of the Named Plaintiffs (Plaintiffs Henderson and Dwight Smith) do not qualify for transfer to DWR based *solely* upon their security classification, which does not take into account their HIV-positive

condition. (Id. at ¶ 7). The Named Plaintiffs have identified only ***two inmates*** who have not qualified for transfer to a work release facility because of the status of their HIV-condition. (See First Amended Complaint, Doc. No. 31, at ¶¶ 22, 30; Naglich Aff., at ¶¶ 6 and 7 and Exhibits A and B thereto). The Named Plaintiffs do not cite any law which demonstrates that "two inmates" is sufficiently "numerous" to justify class certification (assuming the Court accepted their unjustified claims of discrimination).

In summary, over 180 HIV-positive inmates cannot be transferred to a work release center or community work center based exclusively upon their security classification. (Atchison Aff., at ¶¶ 5, 10, 11). Given this indisputable fact, the Named Plaintiffs cannot identify a numerous class of persons who are "barred from transfer to work release centers for no apparent reason other than their HIV status." (First Amended Complaint, Doc. No. 31, at ¶ 87). As such, class certification cannot occur as to this category of claims.

Likewise, there simply can be no "numerosity" relative to the Named Plaintiffs' claim that their inability to move to a correctional facility of their choosing constitutes discrimination. Even if the Named Plaintiffs were not HIV-positive, they would not be automatically entitled to this claimed benefit. Even the Named Plaintiffs unknowingly acknowledged their inability to succeed on their alleged entitlement to a transfer to another facility which (a) offers the vocational

program of their choice, or (b) is located closer to their family. As established through the Affidavit of Stephanie Atchison, the ADOC does not guarantee any inmate the ability to transfer to any correctional facility of their choosing. (Atchison Aff., at ¶ 13). As the Named Plaintiffs write in opposition to the pending Motion to Dismiss, **"[t]he ADA does not require ADOC to afford special treatment to prisoners with HIV**." (Doc No. 37, at p. 22). This is exactly what the Named Plaintiffs are asking for – "special treatment." As with the other classification and housing decisions, these decisions are entirely fact-specific and undertaken on a case-by-case basis. (Atchison Aff., at ¶ 13). There is no mechanism by which the Named Plaintiffs could prove that HIV-inmates are "discriminated against" based upon this transfer issue. In terms of class certification, it is even clearer that the Named Plaintiffs can not demonstrate any class-wide discrimination of a sufficient number of HIV-positive inmates to constitute a class with respect to this claim.

The same holds true for the Named Plaintiffs' allegations related to transfer to another dorm at Limestone. There is simply no allegation or evidence that any members of the purported class qualify for the Honor Dorm, Senior Dorm or Pre-Release Dorm other than a limited number of Named Plaintiffs assigned to Limestone. For example, the Named Plaintiffs only identify five (5) individuals who are allegedly "qualified" for transfer to the "senior dorm," including Named

Plaintiffs Robinson, Knox, Dwight Smith, Douglas, David Smith. (First Amended Complaint, Doc. No. 31, at ¶¶ 21, 24, 26, 28, 32). There is no allegation or evidence of any other HIV-positive inmate at Limestone who is also qualified for housing in the "senior dorm." Once again, the Named Plaintiffs fail to satisfy their burden of proving numerosity in this regard.

The Named Plaintiffs also fail to demonstrate the existence of numerous HIV-positive inmates who allegedly suffer from disparate disciplinary action. Oddly enough, the First Amended Complaint identifies three (3) Named Plaintiffs who apparently have not received any disciplinary action at Limestone. (First Amended Complaint, at ¶¶ 17, 20, 26). The original Complaint also identified another former Plaintiff who did not have any "disciplinary violations." (Complaint, Doc No. 1, at ¶¶ 32). Moreover, only three (3) of the nine (9) Named Plaintiffs decry the disparate disciplinary actions – two of whom are females housed at Tutwiler. (First Amended Complaint at ¶¶ 24, 33, 34, 73, 74). A review of the Complaint, First Amended Complaint and Motion for Class Certification do not identify numerous HIV-positive inmates who are allegedly subjected to disparate disciplinary treatment and, therefore, no class is warranted on this particular aspect of the Named Plaintiffs' claims.

This same analysis holds true regarding the allegations regarding confidentiality. With the release of Plaintiff Hicks, only one Named Plaintiff

(Dana Harley) raises any complaint relative to confidentiality. (Id. at ¶¶ 23, 33). Again, there is no allegation or evidence explaining why only one of nine Named Plaintiffs raises issues with respect to confidentiality. The allegations themselves disprove numerosity.

Considering the fact that Plaintiff John Hicks was the only Named Plaintiff specifically raising issues relative to food service jobs (id. at ¶ 23), and Plaintiff Hicks is no longer incarcerated (Atchison Aff., at ¶ 14), this claim is necessarily extinguished. No other Named Plaintiff asserts such a claim. Therefore, even if the claim was not extinguished with the release of Plaintiff Hicks, there is no allegation or evidence to support any finding of numerosity relative to this grievance.

Finally, there is no basis to allege that the "numerosity" requirement is met with respect to the female HIV-positive inmates. In their Complaint and First Amended Complaint, the Named Plaintiffs break out their allegations specific to the HIV-positive female inmates. As of the date of this Memorandum, there are only ten (10) HIV-positive female inmates at Tutwiler and one (1) HIV-positive female inmate classified as "minimum-out" at MWC. (Id.; see also Naglich Aff., at ¶ 3). Considering the impending release of the one (1) HIV-positive female inmate at MWC (see id.), the number of HIV-positive female inmates will soon likely fall to 10. This is hardly numerous. Moreover, given the limited number of female

facilities where women are housed, the Named Plaintiffs' allegations regarding housing are necessarily and inherently distinct with regard to female inmates. As such, there can be no "class" of female HIV-positive inmates.

When considering the actual claims asserted by the Named Plaintiffs, it is impossible to conclude that the persons impacted by the alleged acts and/or omissions raised by the Named Plaintiffs are numerous. The analysis itself suggests that class certification, if even remotely possible, would require the identification of a large number of subclasses, which necessarily undermines the propriety of a class in the context of these claims. See Sacred Heart, 601 F.3d at 1176 (holding, "[c]ommon sense tells us that '[t]he necessity of a large number of subclasses may indicate that common questions do not predominate.'"). With respect to their specific claims, the Named Plaintiffs have not even established that the number of individuals with any such claim amount to the 31 members utilized in Kilgo v. Bowman Transportation, Inc., 789 F.2d 859, 878 (11th Cir. 1986). For these reasons, the Named Plaintiffs failed to satisfy the requirement set forth in Fed. R. Civ. P. 23(a)(1).

2. The Named Plaintiffs fail to provide an adequate definition of the purported class.

Often cited in connection with the numerosity element is the requirement of an adequately defined class. As the former Fifth Circuit wrote, "[i]t is elementary

that in order to maintain a class action, the class sought to be represented must be adequately defined and clearly ascertainable." DeBremaecker v. Short, 433 F.2d 733, 734 (5th Cir. 1970) (citations omitted).[14] In DeBremaecker, the former Fifth Circuit affirmed the district court's dismissal of the class action allegations and explained that plaintiffs' proposed class "does not constitute an adequately defined or clearly ascertainable class contemplated by Rule 23." Id.; see also Aronson v. Giarrusso, 436 F.2d 955, 957 n.1 (5th Cir. 1971) (affirming dismissal of purported class action and noting that, "[t]here is some question as to whether either the complaint or the evidence adequately defines a clearly ascertainable class") (citing DeBremaecker). Other Circuits have reached a similar conclusion.[15] District courts in the Eleventh Circuit have also acknowledged the preliminary requirement

[14] "Although not specifically mentioned in the rule, an essential prerequisite of an action under Rule 23 is that there must be a 'class.'" 7A C. Wright, A. Miller & M. Kane, Federal Practice & Procedure 3d § 1760.

[15] Roman v. ESB, Inc., 550 F.2d 1343, 1348 (4th Cir. 1976) (*en banc*) ("[I]n order to determine whether a class action is proper, the district court must determine whether a class exists and if so what it includes. Although not specifically mentioned in [Rule 23, Fed. R. Civ. P.] the definition of the class is an essential prerequisite to maintaining a class action."); Adashunas v. Negley, 626 F.2d 600, 604 (7th Cir. 1980) ("[T]he proposed class of plaintiffs is so highly diverse and so difficult to identify that it is not adequately defined or nearly ascertainable. Hence, for that reason, the plaintiff class cannot be maintained.") (citation omitted); Simer v. Rios, 661 F.2d 655, 669 (7th Cir. 1981) ("It is axiomatic that for a class action to be certified a 'class' must exist. In the present case serious problems existed in defining and identifying the members of the class.") (citations omitted); Ihrke v. N. States Power Co., 459 F.2d 566, 573 n.3 (8th Cir. 1972), *vacated as moot*, 409 U.S. 815 (1972).

that a class be definable and easily ascertainable.[16] In effect, the Named Plaintiffs must establish that the proposed class is adequately defined and that the class members are readily ascertainable.

Rather than focusing upon the actual definition of the class of plaintiffs who can assert the claims identified by the Named Plaintiffs, the Named Plaintiffs merely aggregate every HIV-positive inmate who is or will be in the custody of the ADOC. In their Motion for Class Certification, the Named Plaintiffs fail to provide a clear, ascertainable definition of the purported class. As indicated through the affidavit of the ADOC's Assistant Director of Classification, it cannot be said that housing assignments for all HIV-positive inmates are based exclusively or solely upon their HIV-positive condition. (See Atchison Aff.). The classification process itself involves determinations which are independent of an inmate's medical condition. (See id.). As such, it is understandably difficult to define the class of persons whom the Named Plaintiffs seek to utilize in order to

[16] See, e.g., Poe v. Sears, Roebuck & Co., No. CivA1:96-CV-358-RLV, 1998 WL 113561, at *2 (N.D. Ga. Feb. 13, 1998) ("It is axiomatic that before a court can . . . decide whether a class action represents the fairer and more efficient way to handle claims, the class members must be identifiable."); Rink v. Cheminova, Inc., 203 F.R.D. 648, 659 (M.D. Fla. 2001) (denying class certification and explaining that Rule 23 "contains an implicit requirement that the class be 'adequately defined and clearly ascertainable.'") (quoting DeBremaecker, 433 F.2d at 734); Boca Raton Cmty. Hosp.,Inc. v. Tenet Healthcare Corp., 238 F.R.D. 679, 688 (S.D. Fla. 2006) ("Rule 23 implicitly requires that 'the class sought to be represented must be adequately defined and clearly ascertainable.'") (citation omitted).

elevate this matter to a class action. Despite this difficulty, the Named Plaintiffs cannot rely upon an overly broad definition simply out of convenience.

A clear definition of a class in the prison context is especially important given the extraordinary amount of *pro se* litigation originating from all of the ADOC facilities, including Limestone and Tutwiler. As the Court is well-aware, all federal district courts within the State of Alabama have developed forms and specialized procedures to address the complaints of *pro se* inmates who assert claims for alleged constitutional and statutory deprivations. In the absence of a clear, adequately defined class, *pro se* litigants as well as the State will be left guessing as to those persons who will be bound to any final order entered in this matter.

3. The Named Plaintiffs failed to prove the "commonality" requirement.

Rule 23(a)'s second requirement of commonality demands the existence of "questions of law or fact common to the class." Fed. R. Civ. P. 23(a)(2). As with the other requirements under Rule 23(a), "[a] court cannot simply presume that the commonality requirement has been satisfied; the plaintiff bears the burden of proof on this issue." Nelson v. U.S. Steel Corp., 709 F. 2d 675 (11th Cir. 1983) (relying upon Jones v. Diamond, 519 F.2d 1090 (5th Cir. 1975)).

Explaining the difference between commonality and typicality, the Eleventh Circuit wrote:

> In many ways, the commonality and typicality requirements of Rule 23(a) overlap. Both requirements focus on whether a sufficient nexus exists between the legal claims of the named class representatives and those of individual class members to warrant class certification. See Washington v. Brown & Williamson Tobacco Corp., 959 F.2d 1566, 1569 n. 8 (11th Cir. 1992) (citing Falcon, 457 U.S. at 157 n. 13, 102 S.Ct. at 2370 n. 13); . . . see also 7 C. Wright & A. Miller, Federal Practice and Procedure § 1764 (1972). Traditionally, commonality refers to the group characteristics of the class as a whole and typicality refers to the individual characteristics of the named plaintiff in relation to the class. See Baby Neal v. Casey, 43 F.3d 48, 56 (3rd Cir. 1994). These requirements 'serve as guideposts for determining whether under the particular circumstances maintenance of a class action is economical and whether the named plaintiff's claim and the class claims are so interrelated that the interests of the class members will be fairly and adequately protected in their absence.' Falcon, 457 U.S. at 157 n. 13, 102 S.Ct. 2364.

Prado-Steiman, 221 F.3d at 1278-79. The critical "group characteristic" necessary to commonality is that a class action must involve issues that are "susceptible to class-wide proof." See Murray v. Auslander, 244 F.3d 807, 811 (11th Cir. 2001); see also Williams v. Mohawk Indus., Inc., 568 F.3d 1350, 1355 (11th Cir. 2009) (same); Hudson v. Delta Air Lines, Inc., 90 F.3d 451, 457 (11th Cir. 1996) (same).

The Eleventh Circuit has devoted a substantial amount of time warning of the implications of class certification for claims which are not "common" among the putative class. In Rutstein v. Avis Rent-A-Car Systems, Inc., the Court wrote, "serious drawbacks to the maintenance of a class action are presented where initial

determinations, such as the issue of liability *vel non*, turn upon highly individualized facts." 211 F.3d 1228, 1235-36 (11th Cir. 2000). After identifying a number of case-specific issues that would vary among members of the purported class, the Rutstein Court emphasized that individualized defenses relative to particular class members prevented class certification. Id. at 1235-36 & n.15. The Eleventh Circuit also acknowledged that, "liability for damages is a necessarily individualized inquiry" because "[p]laintiffs' claims for damages must 'focus almost entirely on facts and issues specific to individuals rather than the class as a whole.'" Id. at 1239-40 (citations omitted). The Eleventh Circuit concluded that individualized inquiries "demonstrate the profoundly individualistic nature of each plaintiff's claim for damages, and the complete lack of judicial economy in certifying this case as a class action." Id. at 1240.

The Eleventh Circuit's focus in Rutstein on individualized determinations as preventing class certification is reflected in a large number of other Eleventh Circuit cases:

- Jackson, 130 F.3d at 1006 (reversing class certification order and explaining that plaintiffs' "claims will require distinctly case-specific inquiries into the facts surrounding each alleged incident [of defendant's conduct] . . . . [M]ost, if not all, of the plaintiffs' claims will stand or fall . . . on the resolution of these highly case-specific factual issues.")
- Andrews, 95 F.3d at 1023 (reversing class certification order and explaining that while, "at a general level, the predominant issue presented" involved defendant's actions, "as a practical matter, the

resolution of this overarching common issue breaks down into an unmanageable variety of individual legal and factual issues.") (citation omitted)

- Cooper v. Southern Co., 390 F.3d 695, 722-723 (11th Cir. 2004) (affirming denial of class certification, affirming the district court's determination that "issues subject to individualized proof predominated over those that could be established with class-wide proof", and stating that, "the individual determinations on liability and damages necessary for the individual plaintiffs to succeed would require highly fact-specific inquiries concerning each plaintiff.").[17]

The Eleventh Circuit in Klay also addressed the issue of individualized claims, reversing the certification of the purported claims because "'[n]o one set of operative facts establishes liability.'" Id. at 1265 (other citations omitted). The Klay Court also noted that any common legal issues and common facts were "dwarfed by the individualized issues of fact to be resolved" and ruled that "the district court abused its discretion in certifying the claims for classwide treatment." Id. at 1264, 1267. Likewise, district courts throughout the Eleventh Circuit have held that class certification is inappropriate because of the necessity of individualized fact-finding to determine class membership.[18]

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[17] See also Sikes, 281 F.3d at 1366. See generally Kerr v. City of West Palm Beach, 875 F.2d 1546, 1558 (11th Cir. 1989) (class certification is inappropriate if the federal courts must assess "essentially unique factual circumstances").

[18] See generally Rutstein, 211 F.3d at 1240 ("how could the court identify individual members of the class who would be entitled to compensation . . . .?"). In Fisher v. CIBA Specialty Chems. Corp., 238 F.R.D. 273, 301 (S.D. Ala. 2006), the court ruled that class certification was inappropriate "because the class is not adequately defined" and explained that the individualized fact-finding required by

The Named Plaintiffs cannot meet the requirements for commonality because their claims necessarily require individualized inquiries. For example, certain Named Plaintiffs claim an entitlement to a transfer to DWR. (First Amended Complaint, Doc. No. 31 at ¶¶ 21, 22, 26, 30, 32). The decision to transfer any particular inmate (even those inmates who are not HIV-positive) constitutes an individualized decisions, which is rendered on a case-by-case basis. (Atchison Aff., at ¶¶ 3-5). Once again, the affidavit of the ADOC's Assistant Director for Classification establishes and describes the individualized analysis required in the security classification process for each individual. (Id.). To the

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plaintiff's class definition precluded class certification: "Courts have declined to certify a class where the proposed definition would require individualized fact-finding to identify class members. Simply put, '[a] court should deny class certification . . . where the number of individualized determinations required to determine class membership becomes too administratively difficult'". Id. at 301 (citations omitted); see also Adair v. Johnston, 221 F.R.D. 573, 578 (M.D. Ala. 2004) (denying class certification and explaining that, "[w]hen individualized fact-finding and litigation would be necessary in order to identify class members, class certification is inappropriate") (citation omitted); Perez v. Metabolife Int'l, Inc., 218 F.R.D. 262, 269 (S.D. Fla. 2003) (denying plaintiff's motion for class certification and explaining that, "[a] court should deny class certification . . . where the number of individualized determinations required to determine class membership becomes too administratively difficult") (citations omitted); Labauve, 231 F.R.D. at 662 ("Courts have declined to certify a class where the proposed definition would not enable identification of class members short of individualized fact-finding.") (citations omitted); Crosby v. Social Sec. Admin., 796 F.2d 576, 580 (1st Cir. 1986) (certification improper because class members were "impossible to identify prior to individualized fact-finding and litigation"). See generally Winokur v. Bell Fed. Savs. & Loan Ass'n, 58 F.R.D. 178, 181 (N.D. Ill. 1972) ("[I]t would be impossible without a hearing on the claim of each individual member of the class to determine which depositors . . . are in fact members of the class.").

extent that any putative class member claims an entitlement to transfer to DWR, there are multiple questions to consider:

(1) Is the inmate serving a sentence of life without parole?

(2) What is the inmate's security classification?

(3) Does the inmate have any recent disciplinary actions?

(4) Does the inmate have a history of escaping or attempting to escape custody?

(5) Does the inmate have any charges pending against him in any other state?

(6) When is the inmate's end of sentence date?

(7) Is the inmate currently compliant with his HIV-medications, if any?

(8) Does the inmate have any other chronic medical conditions?

(9) Is the inmate compliant with the medical treatment and/or medication he is receiving for any other non-HIV chronic conditions?

(10) Is the inmate capable of working?

(11) Does a transfer to DWR pose any security risk to the inmate?

(12) Is the inmate compliant with his current HIV treatment plan?

(13) Are there open or vacant beds at DWR at the time of the requested transfer?

(14) Is the inmate currently enrolled in the substance abuse program, vocational training or other

programs at Limestone which would prevent his transfer?

(15) Does the inmate wish to transfer to DWR?

(See Atchison Aff., at ¶¶ 3-5). Naturally, these same questions would apply equally to female HIV-positive inmates and consideration of their transfer from Tutwiler. All of these questions are critical to the individualized determination of whether an inmate should be transferred to DWR.[19] And, because the ADA does not afford the Named Plaintiffs "special treatment," they are not exempt from these individualized inquiries. (See Opposition to Motion to Dismiss, Doc. No. 37, at p. 22).

The same is true regarding the Named Plaintiffs' claims of disparate disciplinary treatment. In order to attempt to state a claim for this alleged disparate disciplinary treatment, the Named Plaintiffs rely upon individual complaints involving individualized circumstances. (First Amended Complaint, Doc. No. 31, at ¶¶ 24, 33, 34, 73, 74). Indeed, the issue of discipline, by its very nature, is individualized and not susceptible to "class-wide proof." Thus, an individualized, inmate-by-inmate inquiry would be required in order to determine class membership with respect to the claims identified in the First Amended Complaint,

[19] Named Plaintiffs' suggestion that an HIV-infected inmate is automatically precluded from DWR based exclusively on his HIV-condition is simply false.

so the Named Plaintiffs' proposed class does not constitute a definable or ascertainable class.

3. THE NAMED PLAINTIFFS FAILED TO PROVE THE "TYPICALITY" REQUIREMENT.

"Typicality" refers to Rule 23(a)(3)'s requirement that "the claims or defenses of the representative parties are typical of the claims or defenses of the class." Typicality requires an evaluation of the relationship between the claims asserted by the Named Plaintiffs in terms of whether they are representative of those of the class as a whole. Piazza v. Ebsco Indus., Inc., 273 F.3d 1341, 1346 (11th Cir. 2001)). The Eleventh Circuit applies this requirement as mandating proof from the Named Plaintiffs that they "possess the same interest and suffer the same injury as the class members . . . ." See, e.g., Busby v. JRHBW Realty, Inc., 513 F.3d 1314, 1322 (11th Cir. 2008) (quotations and internal citations omitted). Additionally, the Eleventh Circuit advises that typicality arises when "the claims or defenses of the class and the class representative arise from the same event or pattern or practice and are based on the same legal theory." Kornberg v. Carnival Cruise Lines, Inc., 741 F.2d 1332, 1337 (11th Cir. 1984). Finally, in Wooden v. Board of Regents of University System of Georgia, 247 F. 3d 1262 (11th Cir. 2001), the Eleventh Circuit advised that "typicality" requires proof that the Named Plaintiffs are "part of the class." Id. at 1287-88 (other citations omitted); see also E. Tex. Motor Freight Sys., Inc. v. Rodriguez, 431 U.S. 395, 403 (1977).

In the Named Plaintiffs' two-paragraph argument on typicality, it is difficult to find any alleged facts. A careful search of these two paragraphs reveals one reference to "HIV-discriminatory policies." (Motion for Class Certification, Doc. 3, at pp. 7-8). The Named Plaintiffs omit any discussion of the specific Named Plaintiffs or of the purported class. There is no mention of any specific claim or injury. There is hardly any reference to any law providing any meaningful guidance on the issue of typicality. There is nothing in the Motion for Class Certification which leaves the impression that the Named Plaintiffs even remotely believe they are "part of the [alleged] class." Indeed, they are not.

As demonstrated through the evidence submitted by the State, the purported class identified by the Named Plaintiffs (i.e all HIV-positive inmates) is diverse. The HIV-positive population is not susceptible to the broad generalities employed by the Named Plaintiffs. Even after attempting to categorize the HIV-population according to the claims asserted by the Named Plaintiffs, it is difficult to even identify a "class" of persons who claim to be similarly grieved to the Named Plaintiffs in some manner. The Named Plaintiffs offer no proof or specific allegations indicating that such a group exists.

It is, therefore, difficult to respond to the Named Plaintiffs' typicality argument. They cite no facts to support their typicality argument for one simple

reason – there are none which show typicality. Therefore, in the absence of supporting facts, the Named Plaintiffs' typicality argument must fail.

4. THE NAMED PLAINTIFFS ARE NOT "ADEQUATE REPRESENTATIVES."

If one element of the Named Plaintiffs' Motion for Class Certification warrants discovery, it is the final element – the "adequacy of the class representatives."[20] In London v. Walmart Stores, Inc., the Eleventh Circuit recognized the standards imposed by the Fifth Circuit regarding the adequacy of the class representatives under Fed. R. Civ. P. 23(a)(4). 340 F.3d 1246 (11th Cir. 2003). Citing the Fifth Circuit's opinion in Berger v. Compaq Computer Corp., 257 F.3d 475, 481 (5th Cir. 2001), the London Court recognized that "[a]dequacy is for the plaintiffs to demonstrate; [the plaintiffs are not entitled to any] presumption of adequacy." Id. at 1253. This adequacy requirement "encompasses two separate inquiries: (1) whether any substantial conflicts of interest exist between the representatives and the class; and (2) whether the representatives will

[20] It should also be noted that, "[i]f the named plaintiff seeking to represent a class fails to establish the requisite case or controversy, he may not seek relief on his behalf or on that of the class." Lynch v. Baxley, 744 F.2d 1452, 1456 (11th Cir. 1984)(other citations omitted); see also Griffin, 823 F.2d at 1482-1483 (holding, "[a] named plaintiff in a class action who cannot establish the requisite case or controversy between himself and the defendants simply cannot seek relief for anyone-not for himself, and not for any other member of the class."). Therefore, if the State is entitled to dismissal of any Named Plaintiff, then such Named Plaintiff cannot as a matter of law demonstrate the adequacy of his or her representation of the putative class.

adequately prosecute the action." In re HealthSouth Corp. Sec. Litig., 213 F.R.D. 447, 460-61 (N.D. Ala. 2003); see also Valley Drug, 350 F.3d at 1189 (same). Even without the benefit of discovery, it is evident that at least two (2) Named Plaintiffs are not qualified to serve as representatives of the putative class under any set of circumstances. First, Plaintiff John Hicks is no longer in the custody of the Alabama Department of Corrections. (Atchison Aff., at ¶ 14). Second, Plaintiff David Smith will be released from custody this month (i.e. August 28, 2011). (First Amended Complaint, Doc. No. 31, at ¶ 31). There can be no logical argument that either of these individuals qualify as class representatives. (See Naglich Aff., at ¶¶ 6 and 7 and Exhibits A and B thereto).

The more significant issues arise out of the first area of inquiry – the existence of substantial conflicts of interest. According to the Eleventh Circuit's opinion in Valley Drug:

> A fundamental conflict exists where some party members claim to have been harmed by the same conduct that benefitted other members of the class. In such a situation, the named representatives cannot "vigorously prosecute the interests of the class through qualified counsel" because their interests are actually or potentially antagonistic to, or in conflict with, the interests and objectives of other class members. See, e.g., In re HealthSouth, 213 F.R.D. at 461-63; See also, Auto Ventures, Inc. v. Moran, 1997-1 Trade Cas. (CCH) ¶ 71,779, 1997 WL 306895 (S.D. Fla. 1997) (refusing to certify a class of Toyota dealers because "the class collapses into distinct groups of winners and losers."); Accord, Warren v. City of Tampa, 693 F. Supp. 1051,

> 1061 (M.D. Fla. 1988) ("Conflicts pertaining to the specific issues being litigated will bar class certification.").

In similar fashion, the Supreme Court encouraged courts to "evaluate carefully the legitimacy of the named plaintiffs' plea that he is a proper class representative under Rule 23(a)." Falcon, 457 U.S. at 160. The Supreme Court has even noted that the burden falls upon the Named Plaintiffs to demonstrate the actions untaken to "uncover conflicts of interest between named parties and the class they seek to represent." Amchem, 521 U.S. at 625-26; see also Phillips Petroleum Co. v. Shutts, 472 U.S. 797, 812 (1985) (noting that adequacy of representation is essential to protect due process rights of absent class members); Gen. Tel. Co. of the Northwest, Inc. v. EEOC, 446 U.S. 318, 331, (1980) (noting that "the adequate-representation requirement is typically construed to foreclose the class action where there is a conflict of interest between the named plaintiff and the members of the putative class"); Prado-Steiman, 221 F.3d at 1279 (noting that the "incentives" of the class representative must "align with those of absent class members so as to assure that the absentees' interests will be fairly represented"). Because of the nature of the Named Plaintiffs' claims compared to the "actual conditions" at Limestone, there is an inherent, unavoidable conflict of interests.

There can be no debate that the current housing arrangements for the HIV-positive population at Limestone are the by-product of the prior Leatherwood class

action. (Mitchem Aff., at ¶¶ 3-4). In fact, many of the complaints and grievances voiced by the Named Plaintiffs contradict the very requests and privileges sought by the plaintiff class in Leatherwood. Stated differently, the Named Plaintiffs seek to return to housing in areas from which they had previously insisted upon a transfer. (Id.). This contradiction, in and of itself, illustrates the fundamental conflict of interest among the Named Plaintiffs and the class previously certified in the Leatherwood action. While the Named Plaintiffs could have provided some assurances to the Court that they had taken some action to address potential conflicts of interest, they did not and, at a minimum, the appearance of a problematic conflict remains.

If the Named Plaintiffs achieve the results sought in their First Amended Complaint, such a scenario necessarily begs the question, "Are the Named Plaintiffs actually seeking relief *to the detriment* of the purported class members?" If the Named Plaintiffs succeed, the members of the class would clearly find themselves housed in more crowded dorms at Limestone. (Mitchem Aff., at ¶¶ 3,4 and 8). If the Named Plaintiffs achieve the conditions requested, the members of the class would face lengthened wait times for meals. (Mitchem Aff., at ¶ 4). If the Named Plaintiffs achieve the conditions requested (i.e. the total integration of HIV-positive inmates with the uninfected population), those members of the class

who call any north Alabama county "home" could find themselves transferred to another facility hundreds of miles from their families.

As a more practical matter, it is concerning that the Named Plaintiffs attempt to offer any allegation that their housing arrangements are discriminatory in contravention of the Americans with Disabilities Act, when there is no allegation or evidence that any of the Named Plaintiffs have even entered or know the conditions within the other housing units to which they now seek access. Indeed, the Named Plaintiffs cannot practically decry "discrimination" in their housing circumstances without relying exclusively upon the ill-informed assumption that "the grass is always greener on the other side." In fact, the State firmly believes that the Named Plaintiffs and their counsel will effect a great disservice upon the HIV-positive inmates who are and will be incarcerated at Limestone who will not reap the benefits of their current housing circumstances, if the Named Plaintiffs succeed.

Nothing in the submissions of the Named Plaintiffs provides this Court with any assurance that the wants, needs and desires (much less, the rights) of the other unnamed members of this putative class have been considered in any way in the institution of this action. Therefore, for all of the reasons outlined above, the Named Plaintiffs failed to satisfy Rule 23 and are not entitled to certification of any class.

WHEREFORE, Defendants ROBERT BENTLEY, KIM THOMAS, BILLY MITCHEM, FRANK ALBRIGHT, BETTINA CARTER and EDWARD ELLINGTON respectfully request that the Court deny the Plaintiffs' Motion for Class Certification in its entirety or, in the alternative, stay the Court's consideration of Plaintiffs' Motion for Class Certification until the State is afforded an adequate opportunity to conduct necessary and critical discovery regarding the Named Plaintiffs' request for class certification.

Respectfully submitted on this 1st day of August, 2011,

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CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing with the Clerk of the Court using the CM/ECF system and service will be perfected by email to the CM/ECF participants or by postage prepaid first class mail to the following this the 1st day of August, 2011:

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