

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

**LOUIS HENDERSON, DANA HARLEY,
DARRELL ROBINSON, DWIGHT SMITH,
ALBERT KNOX, JAMES DOUGLAS,
ALQADEER HAMLET, JEFFERY BEYER,
and BONITA GRAHAM, on behalf of
themselves and of all those similarly situated,**

Plaintiffs,

v.

**KIM THOMAS, BILLY MITCHEM,
FRANK ALBRIGHT, BETTINA CARTER
and EDWARD ELLINGTON,**

Defendants.

Civil Action No.: 2:11-CV-00224

**DEFENDANTS' SUPPLEMENTAL OPPOSITION TO PLAINTIFFS'
MOTION FOR CLASS CERTIFICATION**

Defendants KIM THOMAS, BILLY MITCHEM, FRANK ALBRIGHT, BETTINA CARTER and EDWARD ELLINGTON (collectively the "State"), pursuant to the Order of this Court dated October 3, 2010, in response to Plaintiffs' Motion for Leave to File Second Amended Complaint (Doc. No. 67), respectfully submit this Supplemental Opposition to the Motion for Class Certification (Doc No. 2) and more recent Second Amended Complaint (Doc. No. 61) filed by Plaintiffs LOUIS HENDERSON, DANA HARLEY, DARRELL ROBINSON, DWIGHT SMITH, ALBERT KNOX, JAMES DOUGLAS, ALQADEER HAMLET, JEFFERY BEYER, and BONITA GRAHAM ("Named Plaintiffs"). In

support of this Supplemental Opposition, the State submits the Affidavits Stephanie Atchison and Kathy Holt, certifying the Alabama Department of Corrections records for Named Plaintiffs Jeffery Beyer and Bonita Graham, and further states as follows:

INTRODUCTION

On March 28, 2011, Named Plaintiffs moved for class certification under Fed. R. Civ. P. 23, exclaiming they are entitled to class certification based solely upon the allegations set forth in their original Complaint. Now, more than six months and two amended pleadings later, it is clear that Named Plaintiffs' Motion for Class Certification was premature and flawed. Named Plaintiffs' Second Amended Complaint embodies their continuing efforts to correct the defects identified by the State through its submissions to the Court. However, it also highlights the shortcomings of Named Plaintiffs' allegations and their pending request for class certification. More specifically, Named Plaintiffs' Second Amended Complaint demonstrates each of the following:

- (1) The Second Amended Complaint further underscores the State's need for pre-class certification discovery because of Named Plaintiffs' continual assertion of (a) indisputably inaccurate facts, and (b) cursory, non-descript allegations; and
- (2) The Second Amended Complaint highlights the deficiencies in Named Plaintiffs' request for class certification, including:
 - (a) Named Plaintiffs' continual refusal to submit any evidence to support this request;

- (b) the absence of any “new” putative class representatives who have standing to assert some claims upon which class certification is sought;
- (c) the absence of any new allegations satisfying the “numerosity” requirement under Fed. R. Civ. P. 23; and
- (d) both “new” and pre-existing conflicts of interests among the class representatives and the purported class.

In sum, the allegations upon which Named Plaintiffs have sought class certification have been in flux over the last six months. The numerous amendments to the pleadings warrant valid concerns as to whether grounds for class certification truly exist. For these reasons, as discussed below, the State respectfully requests that this Court postpone its decision on class certification after limited discovery and/or deny the motion for class certification in its entirety.

PROCEDURAL HISTORY

This action was instituted on March 28, 2011, by ten Plaintiffs—three of whom are no longer parties to this action. (See Complaint, Doc. No. 1 at pp. 1-10). On April 11, 2011, former Plaintiffs Roosevelt James and April Stagner voluntarily dismissed their claims based upon their release from prison. (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 seven Named Plaintiffs and two additional Plaintiffs—David Smith and James Douglas—filed the First Amended Complaint on May 11, 2011, reflecting these changes. (Doc. No. 31).

Addressing the perfunctory nature of the allegations set forth in the First Amended Complaint, the State filed its Motion to Dismiss and supporting Memorandum of Law on May 25, 2011. (Doc. Nos. 34 and 35). Thereafter, pursuant to an Order dated July 15, 2011 (Doc. No. 44), the State filed a Motion to Stay or, in the Alternative, Opposition to Plaintiffs' Motion for Class Certification on August 1, 2011.¹ (Doc. No. 47). In reply, Named Plaintiffs subsequently filed Plaintiffs' Response to Defendants' Motion to Stay or, in the Alternative, Opposition to Plaintiffs' Motion for Class Certification. (Doc. No. 49). On September 16, 2011, the Court held a hearing on the State's Motion to Dismiss and Named Plaintiffs' Motion for Class Certification, along with two Motions to Strike filed by the State (Doc. Nos. 40 and 51). The State's Motion to Dismiss and two Motions to Strike, and Named Plaintiffs' Motion for Class Certification remain pending as of this date.

Following the hearing on September 16, 2011, two Plaintiffs—John Hicks and David Smith—voluntarily dismissed their claims on September 29, 2011, based upon their release from the ADOC prison system (Doc. Nos. 57 and 58). Plaintiff Melinda Washington also voluntarily dismissed her claims on September 29, 2011, without any explanation. (Doc. No. 59). Ms. Washington remains

¹ Named Plaintiffs filed their Motion for Class Certification (Doc. No. 2) contemporaneously with the original Complaint on March 28, 2011.

incarcerated at the Julia Tutwiler Facility for Women as of the date of this Supplemental Response. (Supplemental Affidavit of Stephanie Atchison at ¶ 3, attached hereto as Exhibit 1). That same day, the remaining Named Plaintiffs requested leave to file a Second Amended Complaint. (Doc. No. 60). The Second Amended Complaint removes the recently dismissed Plaintiffs and includes three new Plaintiffs—Alqadeer Hamlet, Jeffery Beyer, and Bonita Graham. (Doc. No. 61).

On October 3, 2011, this Court entered an Order granting Plaintiffs’ Motion for Leave to File Second Amended Complaint and directing the State to file: (1) an objection, if any, to allowing Named Plaintiffs’ leave to amend their complaint; (2) a response to the Second Amended Complaint; and (3) a statement as to how the addition of the three (3) new Plaintiffs affects the issue of class certification. (Doc. No. 67-1).

SUPPLEMENTAL NARRATIVE STATEMENT OF
UNDISPUTED FACTS REGARDING THE
SECOND AMENDED COMPLAINT

Plaintiff Jeffery Beyer is an HIV-positive inmate at Limestone Correctional Facility. (Second Amended Complaint at ¶ 31). Plaintiff Beyer generally alleges exclusion from “a number of ADOC programs.” (*Id.*) A review of Plaintiff Beyer’s institutional records reveals that a psychologist at Limestone has recommended Plaintiff Beyer for the Substance Abuse Program (“SAP”) and

Depression Education and Stress Management classes; however, he has yet to request participation in these programs. (See Beyer ADOC File, Doc. (A), attached hereto as Exhibit 2).

Plaintiff Bonita Graham is currently incarcerated at the Julia Tutwiler Prison for Women. (Second Amended Complaint at ¶ 33). Plaintiff Graham erroneously alleges her exclusion from various “programs, privileges, activities, and services” at Tutwiler is solely based on her HIV status. (Id. at ¶ 34). However, Plaintiff Graham fails to mention her participation in numerous prison programs, including SAP², Anger Management Skills Workshop, Relationship Conflicts Skills Workshop, Grief/Depression Skills Workshop, and the Domestic Violence Workshop. (See Graham ADOC File, Docs. (A) and (D), attached hereto as Exhibit 3). Plaintiff Graham also attended a presentation regarding the Prison Rape Elimination Act of 2003 offered by the prison. (Id., Doc. (E)).

Plaintiff Graham also received various special privileges, which are also noticeably absent from the Second Amended Complaint. For example, she was approved for admission into the transitional housing program upon her release. (Id., Doc. (F)). Moreover, ADOC provided special permission for Plaintiff

² In fact, Plaintiff Bonita Graham had at one point refused to participate in the Substance Abuse Program and signed an Inmate Refusal to Participate Form to that effect. (See Graham ADOC File, Doc. (B), attached hereto as Exhibit 3).

Graham to visit with her mother, who is also incarcerated at Tutwiler. (Id., Doc. (G)). In other words, Plaintiff Graham has not been excluded from programs, services, privileges or activities.

Finally, Plaintiff Graham has been found guilty of several disciplinary violations which are wholly independent of her HIV-positive condition, including writing love/sexual letters to other inmates, engaging in verbal and physical altercations with other inmates, fighting with a weapon, and threatening other inmates and ADOC officials. (Id., Docs. (C), (H)-(S)). Notably, most of these facts (though highly relevant) are entirely absent from Named Plaintiffs' Second Amended Complaint.

ARGUMENT

I. THE ADDITION OF THREE NEW PLAINTIFFS UNDERSCORES THE CONTINUING NEED FOR DISCOVERY ON THE ISSUE OF CLASS CERTIFICATION.

In an effort to address the shortcomings of the First Amended Complaint, Named Plaintiffs dismissed those Named Plaintiffs who have been released from prison, or otherwise are incapable of adequately representing the interests of the class. In their place, the Second Amended Complaint names three new Named Plaintiffs proffered as purported representatives of potential class members who offer little, if any, substantive support for their putative class aspirations. If the Court is inclined to certify a class in this matter, the Second Amended Complaint

offers valid grounds for pause to consider allowing the parties to conduct discovery on the issue of class certification before any further proceedings in the case.

A. NAMED PLAINTIFFS CONTINUE TO ALLEGE INACCURATE FACTS AND HAVE NOT EVEN ATTEMPTED TO SUPPORT THEIR CLAIMS WITH ANY EVIDENCE.

Instead of following the sound legal principles cited in the State's Opposition to Named Plaintiffs' Motion for Class Certification (see Doc. No. 47 at pp. 37-39), Named Plaintiffs continue to rely solely on their ever-changing pleadings. However, the pleadings alone do not create a factual record upon which this Court can make any factual findings necessary to certify a class. This is particularly true because Named Plaintiffs' pleadings assert inaccurate allegations that are indisputably false. See Vega v. T-Mobile USA, Inc., 564 F.3d 1256, 1267 (11th Cir. 2009) (“[A] district court’s factual findings must find support in the evidence before it.”)

In its Opposition to Class Certification, the State identified in detail the numerous inaccuracies in the First Amended Complaint. (See Opposition to Class Certification at pp. 18-21). The State will not rehash all of those inaccuracies here; however, the prior inaccurate allegations asserted by Named Plaintiffs were well-known to all parties to this action because the State provided clear evidence in the form of affidavits to refute these erroneous statements in its Opposition to Class Certification. Named Plaintiffs ignore most of the inaccuracies identified by the

State. Rather than addressing the known inaccuracies in their First Amended Complaint, the Named Plaintiff filed their Second Amended Complaint, adding three new Named Plaintiffs coupled with additional unsupportable allegations.

For example, Plaintiff Jeffery Beyer complains that the State excluded him from participation in various programs at Limestone. (Second Amended Complaint at ¶ 31). This is not accurate. Limestone has recommended Plaintiff Beyer for the Substance Abuse Program (“SAP”) and Depression Education and Stress Management classes; however, he *voluntarily chose not* to participate in these programs. (Beyer ADOC File, Doc. (A)). In other words, Plaintiff Beyer has opted to not participate in various programs, activities, and services offered at Limestone for which he is eligible. (See id.). Contrary to his allegations, Plaintiff Beyer has not been excluded from any such programs because he has HIV, but simply because of his individual choices.

Likewise, Plaintiff Bonita Graham erroneously alleges that the State excluded her from various programs, privileges, activities, and services at Tutwiler. (Second Amended Complaint at ¶ 34). However, Plaintiff Graham has also participated in several prison programs, including SAP, Anger Management Skills Workshop, Relationship Conflicts Skills Workshop, Grief/Depression Skills Workshop, and the Domestic Violence Workshop. (Graham ADOC File, Docs.

(A) and (D)). She also attended a presentation regarding the Prison Rape Elimination Act of 2003 offered by the prison. (Id., Doc. (E)).

Plaintiff Graham has also been given special privileges. For example, she was approved for admission into the transitional housing program upon her release. (Id., Doc. (F)). ADOC has also made special approval for her to visit with her mother, who is also incarcerated at Tutwiler. (Id., Doc. (G)). In other words, the State is not aware of any evidence of any kind to support the allegations included in the Second Amended Complaint. Indeed, to grant class certification based upon the Second Amended Complaint, would require the Court to presume some alleged exclusion in the face of inclusion in all kinds of “programs, privileges, activities, and services.” Nothing under Rule 23 permits this type of *carte blanche* acceptance of unsupportable, disproven allegations.

Finally, the Second Amended Complaint also fails to disclose Plaintiff Graham’s extensive disciplinary record, which is particularly critical considering the allegations and relief sought. Since her first incarceration within ADOC in 1997, Plaintiff Graham has been found guilty of several disciplinary violations, including writing love/sexual letters to other inmates, engaging in verbal and physical altercations with other inmates, fighting with a weapon, and threatening other inmates and ADOC officials. (Id., Docs. (C), (H)-(S)). To the extent Plaintiff Graham is medically cleared to participate in work release and other

various programs, her approval to participate would still be contingent upon other factors such as her disciplinary record, not her status as an HIV-positive inmate.

In addition to these shortcomings, it is also worth noting that Plaintiff Alqadeer Hamlet is currently incarcerated at Decatur Work Release (“DWR”) and has been so since March 2011. (Second Amended Complaint at ¶ 29). Likewise, Plaintiff Dwight Smith was approved for transfer to DWR on August 30, 2011. (Id. at ¶ 24). The transfer of these two Named Plaintiffs to DWR completely undermines Named Plaintiffs’ allegation that HIV-positive prisoners are not being transferred to work release because of their HIV status. (See id. at ¶¶ 18, 20, 28, 34). However, even after receiving undisputed evidence disproving this allegation, Named Plaintiffs continue to repeat this same allegation throughout the Second Amended Complaint. (Id.).

In summary, Named Plaintiffs chose to seek class certification in the absence of evidence, relying exclusively upon the allegations in their pleadings. In opposing Named Plaintiffs’ Motion for Class Certification, the State provided Named Plaintiffs with indisputable evidence disproving a number of the allegations central to Named Plaintiffs’ claims. Despite having more than six months to do so, Named Plaintiffs chose to not offer *any* evidence to challenge the evidence submitted by the State. Instead, Named Plaintiffs elected to further muddy the proverbial waters by offering more inaccurate allegations of facts in

their third attempt at pleading their claims. Named Plaintiffs have pursued a course in this action in derogation of Rule 23's standard for class certification. As such, class certification should be denied or, in the alternative, the Court should at least allow the parties to conduct discovery before certifying any class.

B. THE SECOND AMENDED COMPLAINT FAILS TO PROVIDE NOTICE TO THE STATE OF THE GROUNDS UPON WHICH NAMED PLAINTIFFS SEEK RELIEF.

The Second Amended Complaint is so vague and non-specific that it is impossible to glean an understanding of Named Plaintiffs' actual claims. Named Plaintiffs have repeatedly failed to address the fatal deficiencies in their pleadings. Rather than addressing these deficiencies, Named Plaintiffs simply join additional parties—a remedy akin to placing a Band-Aid on a gunshot wound.

The Second Amended Complaint does nothing more than change the parties and reassert the same unsupported, cursory allegations of discrimination that simply fail to state a clear claim for relief. Specifically, Named Plaintiffs continue to allege in a non-descript manner that, “Defendants exclude [Named Plaintiffs] from . . . programs, privileges, activities, and services solely because [they] have HIV.” (Second Amended Complaint at ¶¶ 18, 20, 22, 25, 27, 30, 31, 34). This generic allegation fails to expressly identify the exact programs, privileges, activities, and services in which the Named Plaintiffs seek participation. As specified below, the Second Amended Complaint is also replete with claims for

which there is not a single Named Plaintiff who purports to have such alleged injuries. The fact remains that Named Plaintiffs continue to change the Plaintiffs, change their claims, and change their story, making it very difficult for the State to clearly understand the issues in this proceeding. Nothing in the Second Amended Complaint alters the fact that Named Plaintiffs have not stated any clear claims for relief to which they are entitled. Indeed, to allow this matter to proceed on these pleadings (or, for that matter, as a certified class) would merely serve to reward Named Plaintiffs for their non-compliance with Rule 8(a), while leaving the State at the disadvantage of having to discover the true nature of the claims asserted. In short, the State requires discovery in order to understand the basis for Named Plaintiffs' allegations before consideration of certifying any class.

II. THE NAMED PLAINTIFFS CANNOT SATISFY THE REQUIREMENTS OF FED. R. CIV. P. 23.

In the event the Court chooses not to allow the State an opportunity to first conduct full discovery on the issue of class certification, the filing of a Second Amended Complaint further undermines Named Plaintiffs request for class certification pursuant to Fed. R. Civ. P. 23. In order to meet the requirements of Rule 23(a), Named Plaintiffs shoulder the burden of satisfying the prerequisites of

numerosity, commonality, typicality, and adequacy of representation.³ See Klay v. Humana, Inc., 382 F.3d 1241, 1250 (11th Cir. 2004). To do so, the Eleventh Circuit has made it clear that “[g]oing beyond the pleadings is necessary, as a court must understand the claims, defenses, relevant facts, and applicable substantive law in order to make a meaningful determination of the certification issues.” See Vega v. T-Mobile USA, Inc., 564 F.3d 1256, 1266 (11th Cir. 2009) (quoting Castano v. Am. Tobacco Co., 84 F.3d 734, 740 (5th Cir. 1996)).

Thus, as a preliminary matter, and in reference to our earlier argument, Named Plaintiffs refuse to submit evidence in support of their Motion for Class Certification and have not created *any* factual record for the Court’s benefit by relying exclusively on the pleadings. Named Plaintiffs know that many of the central allegations in their pleadings are unsupportable and have not offered anything to the contrary. Named Plaintiffs cannot claim that they did not have sufficient time to submit evidence. Indeed, they had six months and yet failed to do so. Simply put, they have offered cursory, inaccurate allegations without any meaningful justification. It is entirely inconceivable that Named Plaintiffs could satisfy their burden under Rule 23 by submitting additional allegations which are

³ The State will not reassert its arguments as to the prerequisites of commonality and typicality because the same arguments apply to the three new Named Plaintiffs and the Second Amended Complaint.

indisputably incorrect and non-descript. Based entirely upon Named Plaintiffs' failure to satisfy their burden under Rule 23, their Motion for Class Certification is due to be denied.

A. NAMED PLAINTIFFS DO NOT HAVE STANDING TO ASSERT ALL OF THE CLAIMS ASSERTED.

As of the date of this filing, there is no pleading on the record that sufficiently shows that Named Plaintiffs have standing to bring each claim asserted on behalf of the class. See Prado-Steiman ex rel. Prado v. Bush, 212 F.3d 1266 (11th Cir. 2000) (quoting Griffin v. Digger, 823 F.2d 1476, 1482 (11th Cir. 2000) (“[A]ny analysis of class certification must begin with the issue of standing.”)). It is well established that “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, 823 F.2d at 1483. Even after adding additional Plaintiffs and amending the Complaint, Named Plaintiffs still do not have standing to make the following claims:

- (1) Public disclosure and stigmatization at Limestone (Second Amended Complaint at ¶ 48);
- (2) Exclusion from residential Pre-Release Unit at Limestone (id. at ¶ 55);
- (3) Exclusion from kitchen jobs at Limestone (id. at ¶ 58);
- (4) Disparate punishment for appearance without armbands at Limestone (id. at ¶ 66);

- (5) Exclusion of prisoners with HIV from the residential component of the Tutwiler Substance Abuse Dormitory (id. at ¶ 78);
- (6) Exclusion of prisoners with HIV from Tutwiler kitchen jobs (id. at ¶ 79); and
- (7) Exclusion of prisoners with HIV from the Community Corrections Program (id. at ¶ 80).

Named Plaintiffs fail to identify any one individual by name who has suffered the above referenced injuries. Named Plaintiffs have come up empty-handed in trying to find Named Plaintiffs who can justify these claims. Indeed, if Named Plaintiffs had any plaintiffs with standing to assert these claims, surely they would have included them in the Second Amended Complaint since the pleadings are the only basis for their Motion for Class Certification. Absent a showing that at least one Named Plaintiff has suffered the injury that gives rise to these claims, see Griffin, 823 F.2d at 1483, Named Plaintiffs do not have standing to bring these class action claims.

B. NAMED PLAINTIFFS CANNOT SATISFY THE NUMEROSITY REQUIREMENT.

Assuming *arguendo* that Named Plaintiffs have standing to bring their class claims, the inclusion of three new Plaintiffs in the Second Amended Complaint does not alter the fact that the putative class members likely affected by these new allegations of discrimination are not numerous. The Eleventh Circuit has held that mere allegations of numerosity are insufficient to meet the numerosity prerequisite

under Ruler 23(a). See Evans v. U.S. Pipe & Foundry Co., 696 F.2d 925, 930 (11th Cir. 1983). Since Named Plaintiffs now apparently rely exclusively on the Second Amended Complaint to support their request for class certification, there is no conceivable way that Named Plaintiffs can meet the numerosity requirement for the following claims:

ALLEGATIONS / REQUESTED RELIEF	INVOLVED NAMED PLAINTIFFS	PARAGRAPH CITATIONS ⁴
Requesting transfer to a men's Work Release program	Henderson, Robinson, Douglas	18, 20, 28
Requesting transfer to a women's Work Release program	Graham	34
Delay in transfer to Decatur Work Release facilities	Smith	24
Requesting transfer from Limestone to Another Facility with certain vocational programs or closer to "home"	Henderson, Robinson, Smith, Douglas, Hamlet	18, 20, 25, 27, 30
Requesting transfer to Faith-Based Honor, Senior, or SAP Dorms at Limestone	Henderson, Robinson, Knox, Douglas, Beyer	18, 20, 22, 23, 24, 50, 52
Requesting transfer to Faith-Based Honor or Medical Dorms at Tutwiler	Graham	34, 76
Alleged Disparate Disciplinary Action at Limestone	Knox	23
Alleged Disparate Disciplinary Action at Tutwiler	Harley	74

⁴ These paragraph citations refer to the Second Amended Complaint. (Doc. No. 61).

Exclusion from Food Services Positions at DWR	Hamlet	29
Alleged arbitrary medical clearance criteria for work release	Robinson, Graham	21, 34, 86
Alleged Disclosure of HIV condition	Harley	32

Addressing only the newly asserted claims, Plaintiff Bonita Graham asserts that the ADOC employs arbitrary medical clearance criteria for approving HIV inmates at Tutwiler for work release. (Second Amended Complaint at ¶ 34). She is the *only* Named Plaintiff who makes this allegation as it relates to transferring women to work release. This is hardly numerous. See Cox v. Am. Cast Iron Pipe Co., 784 F.2d 1536, 1553 (11th Cir. 1986) (“[W]hile there is no fixed numerosity rule, generally less than twenty-one is inadequate, more than forty adequate, with numbers between varying according to other factors.”) (internal quotations omitted). Even if Graham’s claim were grouped with Plaintiff Robinson’s similar claim, *two class members* still is not adequate to meet the numerosity requirement. Since Named Plaintiffs have made the effort of finding new Plaintiffs, they certainly could have also found additional Plaintiffs for each of their asserted claims so as to put to bed any arguments that they have not met the numerosity requirement. Indeed, if Named Plaintiffs were in fact aware of other inmates who had been allegedly harmed as a result of ADOC’s medical criteria, then Named

Plaintiffs would have identified or referenced them in the Second Amended Complaint (since they are relying solely on their pleadings as a basis for class certification). They did not.

In similar fashion, Plaintiff Graham is also the *only* Named Plaintiff who claims that she has been excluded from the Faith-Based Honor Dorm and Medical Dorm at Tutwiler. Even if her claim that she is excluded from a particular dormitory because of her HIV status were grouped with the similar claims of Plaintiffs Henderson, Robinson, Knox, Douglas, and Beyer, Named Plaintiffs still do not meet the numerosity requirement as to this alleged injury. Six class members with a particular claim does not satisfy the numerosity requirement, and Named Plaintiffs have not identified any other potential class members who have allegedly been excluded from particular dormitories because of their HIV status.

Further, since the filing of the First Amended Complaint, Plaintiff Dwight Smith has been transferred to Decatur Work Release (“DWR”) and the Second Amended Complaint reflects this change in his allegations. (Second Amended Complaint at ¶ 24). However, Plaintiff Smith now claims that the delay in transfer to DWR was solely because of his HIV status. (*Id.*). He is the *only* new Named Plaintiff that even asserts this claim. If there were more HIV-positive inmates who also claim to have been injured by a delay in their transfer to work release, then Named Plaintiffs certainly would have identified or referenced them in their

Second Amended Complaint. Named Plaintiffs can cite to no case law where only *one class member* for a particular claim satisfies the numerosity requirement.

Likewise, Plaintiff Alqadeer Hamlet is the *only* Named Plaintiff who claims to have been prohibited from working in food services jobs at DWR because he has HIV. (Second Amended Complaint at ¶ 29). Named Plaintiffs have not identified any other potential class members who share this same alleged injury. Again, this is a far cry from numerosity.

By virtue of the new Plaintiffs and new claims in the Second Amended Complaint, Named Plaintiffs further demonstrated their inability to satisfy the numerosity requirement as to any of the claims they have asserted. Accordingly, this Court should not certify a class as to any of these claims in which numerosity is so noticeably absent.

C. THE SECOND AMENDED COMPLAINT COMPOUNDS THE ISSUES WITH THE ADEQUACY OF THE CLASS REPRESENTATIVES.

The three new Plaintiffs identified in the Second Amended Complaint are no more adequate as representatives of the purported class than the other Named Plaintiffs. The requirement that the class representatives be adequate focuses on two inquiries: (1) whether any substantial conflicts of interest exist between the representatives and the class; and (2) whether the representatives will adequately prosecute the action. See In re HealthSouth Corp. Sec. Litig., 213 F.R.D. 447, 460-61 (N.D. Ala. 2003). As to the first prong, the Second Amended Complaint

has revealed two serious conflicts of interest that would preclude this class from being certified.

First, the inclusion of Plaintiff Alqadeer Hamlet and Plaintiff Dwight Smith's amended allegations create a conflict of interest with the claims of Plaintiffs Henderson, Robinson, and Douglas that they have not been transferred to work release because of their HIV status. Plaintiff Hamlet is currently incarcerated at Decatur Work Release and Plaintiff Smith was approved for transfer to Decatur Work Release on August 30, 2011. The fact that two Named Plaintiffs are currently incarcerated within DWR entirely contradicts the arguments of Plaintiffs Henderson, Robinson, and Douglas. This glaring conflict of interest further highlights the individualized nature of the claims. For this case to proceed as a class action, at a minimum, Named Plaintiffs would have to again amend their pleadings. The question is: How many amendments will the Court allow before certifying a class without discovery?

The second conflict of interest arises with the dismissal of former Plaintiff Melinda Washington. Of the Named Plaintiffs who have been dismissed from this action, Ms. Washington is the only one who has *not* been released from prison. (Atchison Suppl. Aff. at ¶ 3). She remains incarcerated at Tutwiler today, (*id.*), and based upon the proposed definition of the class as "all other prisoners with HIV in the custody of ADOC, now and in the future," (Second Amended

Complaint at ¶ 107), her continued incarceration undoubtedly makes her a potential class member. This calls into question why Melinda Washington is no longer a Named Plaintiff. Certainly it is not because she fears scrutiny from her name or HIV status being made public, since that has already occurred. The Second Amended Complaint clearly fails to provide any explanation for Ms. Washington's abrupt departure as a Named Plaintiff. Moreover, it fails to explain whether Ms. Washington wishes to remain a member of the class, in the event that a class is ever certified. Therefore, none of the Named Plaintiffs are adequate representatives to bring this putative class action, and as such, this class cannot be certified.

CONCLUSION

For the foregoing reasons, Defendants KIM THOMAS, BILLY MITCHEM, FRANK ALBRIGHT, BETTINA CARTER and EDWARD ELLINGTON respectfully request that the Court deny 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 discovery regarding class certification.

Respectfully submitted on this 17th day of October 2011,

/s/ Janine A. McKinnon
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CERTIFICATE OF SERVICE

I hereby certify that on the 17th of October 2011, I electronically filed the foregoing with the Clerk of the Court and this pleading will be served on all parties registered with the Court's ECF filing system.

/s/ Janine A. McKinnon

*One of the Attorneys for the
Defendants*