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

LOUIS HENDERSON, et al., Plaintiffs, v. **ROBERT BENTLEY, Governor of Alabama, et al.,** Defendants.	Civil Case No. 2:11cv224-MHT

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

INTRODUCTION

Defendants oppose Plaintiffs' motion for certification as a Rule 23(b)(2) class on the ground that Plaintiffs have not proved that they meet the four requirements of Rule 23(a). Plaintiffs respond to those arguments in Part I of this Memorandum.

Defendants argue for a stay of class certification proceedings, as well as a stay of any discovery by Plaintiffs, until (a) the Court has decided the motion to dismiss the Complaint, and (b) Defendants have taken discovery on the issue of class certification. Plaintiffs respond to those arguments in Part II of this Memorandum.

I. PLAINTIFFS SATISFY THE REQUIREMENTS FOR CLASS CERTIFICATION

Defendants contend that Plaintiffs' class certification allegations are insufficient to define the class or meet the requirements of Rule 23(a), and they argue that Plaintiffs were required to submit proof of the allegations in their motion to certify the class. (Def. Mem. 35-66).

Plaintiffs' allegations amply meet the requirements of Rule 23 for class certification and no proof need be submitted for class certification.

A. Plaintiffs Have Provided an Adequate Definition of the Class

The Plaintiffs have proposed the following class definition: "All prisoners diagnosed with HIV in the custody of the Alabama Department of Corrections, now and in the future." (Plaintiffs' Motion for Class Certification (Doc. 2).) Defendants assert that this definition is inadequate because it does not "provide a clear, ascertainable definition of the purported class," and "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 by any final order entered in this matter." (Def. Mem. 51, 52.)

The opposite is true: the proposed class definition leaves no room for guesswork as to which prisoners in Alabama Department of Corrections ("ADOC") custody are class members. ADOC does not deny that it tests for HIV each and every prisoner who enters the system, and permanently segregates all who test positive. (*See* First Amended Complaint (Doc. 31) ¶ 1.) Defendants know at every moment the identity of every current member of the proposed class, and each future member as he or she is taken into ADOC custody.

Defendants argue nevertheless that the proposed definition does not provide a clear, ascertainable definition of the purported class because "it cannot be said that housing assignments for all HIV-positive inmates are based exclusively or solely upon their HIV-positive condition," and because "the classification process itself involves determinations which are independent of an inmate's medical condition." (Def. Mem. 51.) But Plaintiffs do not claim that they are exempt from the classification and program eligibility requirements that other prisoners must meet to qualify for particular prison programs and services; rather, they claim that they are

excluded, solely because they have HIV, from programs and services for which they are otherwise qualified. Plaintiffs allege that even though "ADOC uses an objective classification system to assign prisoners to appropriate custody levels," and "[p]rison classification experts use standardized risk instruments and evidence- based judgments to make these decisions," nevertheless "ADOC's segregation policy trumps all the usual considerations that prison officials take into account in making classification decisions, and results in prisoners at different custody levels being housed together for no reason other than they have HIV." (First Amended Complaint (Doc. 31) ¶¶ 36, 40.)

B. Plaintiffs Were Not Required to Submit Proof of their Rule 23 Allegations

Defendants claim that Plaintiffs' "failure to provide any proof beyond the mere allegations of their pleadings is fatal" to their request for class certification (Def. Mem. 38) and that Plaintiffs were required to provide "admissible evidence." (Def. Mem. 39.) There is no such rule. "Sometimes the issues are plain enough from the pleadings to determine whether the interests of the absent parties are fairly encompassed within the named plaintiff's claim, and sometimes it may be necessary for the court to probe behind the pleadings before coming to rest on the certification question." *Gen. Tel. Co. of the Southwest v. Falcon*, 457 U.S. 147, 160 (1982).

This is a case where "the issues are plain enough from the pleadings [that] the interests of the absent parties are fairly encompassed within the named plaintiff's claim." *Compare Access Now, Inc. v. Ambulatory Surgery Center Group, Ltd.*, 197 F.R.D. 522, 529, 530 (S.D. Fla. 2000) (certifying a class of disabled persons who alleged violations of the ADA by operators of medical facilities, based on plaintiffs' allegations that the defendants had discriminated against them through various structural and operational barriers; "The Plaintiffs purport to a represent a

numerous but identifiable class of all disabled persons, all of whom can be expected to have the same or similar claims, and all of whom are seeking the same or similar injunctive relief as to each facility. While each Defendant can be expected to have a different set of access issues under Title III for its facility, the factual issues will recur, and the same legal principles will apply in any event. The Plaintiffs have adequately alleged and offered support for each of the requirements supporting certification of a plaintiff class and for inclusion of the named defendants herein."). It would be pointless to require Plaintiffs to submit proof of their class allegations as a condition of certification since at this juncture Defendants have not even contested their essential allegations. *See Association for Disabled Americans, Inc. v. Amoco Oil Co.*, 211 F.R.D. 457, 464 (S.D. Fla. 2002) (presuming adequate representation and certifying class bringing ADA suit where defendants failed to present contrary evidence).

Plaintiffs allege that ADOC has a policy of categorically segregating prisoners with HIV and categorically barring all otherwise qualified prisoners with HIV from participation with prisoners who do not have HIV in all prison programs and services with a residential component – including senior housing, the residential substance abuse treatment program, the residential pre-release unit, the faith-based honor dormitory, kitchen jobs, prison jobs other than sanitation and maintenance jobs in their own housing areas, dining hall, and community corrections. (*See* Amended Complaint (Doc. 31) ¶¶ 46-79.) Plaintiffs further allege that ADOC categorically bars all otherwise qualified male prisoners with HIV from assignment to prisons that offer programs, privileges and services that are unavailable at Limestone, including, among many others, the Frank Lee Youth Center, the Hamilton Aged and Infirm Center, and the Alabama Therapeutic Education Center. (*See id.* ¶¶ 90-102.) Plaintiffs allege that Defendants publicly stigmatize prisoners with HIV and disclose their HIV status by housing all prisoners with HIV separate and

apart from all others and by requiring men with HIV to wear white armbands. (*See id.* ¶¶ 48, 70, 71.) Plaintiffs allege that as a matter of policy Defendants subject prisoners with HIV to harsher punishment than other prisoners, solely because they have HIV. (*See id.* ¶¶ 65, 66, 72.) Plaintiffs specifically allege that individual Plaintiffs have been subjected to these discriminatory policies. (*See, e.g.*, *id.* ¶¶ 17-34, 73-74).

ADOC has neither denied these detailed allegations nor submitted any evidence to contradict them. The only specific facts alleged in the Amended Complaint that Defendants dispute relate to certain aspects of ADOC's discrimination against prisoners with HIV in the work release program.

Regarding work release, Defendants do not dispute that the Limestone classification team has recommended Plaintiff Henderson for "minimum-out" custody and transfer to a work release facility, but they dispute that Mr. Henderson is actually qualified for transfer to a work release facility since he was previously involved in an escape incident. (Def. Mem. 19.)

Likewise, Defendants do not dispute that the Limestone classification team recommended Plaintiff Robinson for transfer to a work release facility; rather, they dispute that Mr. Robinson is actually qualified for transfer, because, they claim, he has been smoking and has failed to maintain a healthy body weight, and blood tests "indicate" that he has been non-compliant with his medication regimen. (*Id.* at 19-20.)

Similarly, Defendants do not dispute that a classification specialist recommended that Plaintiff Douglas be transferred to a work release facility; rather, they contend that he has not been medically cleared because he has been "non-compliant with the direct recommendation of his licensed provider in taking responsibility for his overall health and medical treatment." (*Id.* at 21.)

Defendants do not dispute that Plaintiff David Smith is qualified for work release and that for the last year, at least since September 10, 2010, he has met ADOC's highly restrictive medical criteria for work release (*see* Amended Complaint (Doc. 31) ¶ 32); Defendants merely note that he will soon be released from ADOC custody (Def. Mem. 21) (making him ineligible, of course, to serve as a class representative, though not as a witness).

Finally, Defendants do not dispute that a number of the current Plaintiffs are qualified by virtue of their security classifications for transfer to a work release facility; they merely dispute whether any of the current class members are "permitted to accept employment with a third-party employer through the work release program," though they may be qualified for assignment "to a supervised work squad which does leave the facility to conduct work outside of the facility." (Def. Mem. 12.)

These are all relatively minor factual disputes in the context of the entire sweep of Plaintiffs' detailed allegations. The factual disputes created by Defendants' declarations on these matters should be resolved during the normal course of discovery, not on the motion for class certification.

None of the cases Defendants cite support their claim that Plaintiffs were required to bolster their allegations with "admissible evidence," nor do the cases establish a per se rule against granting class certification on the pleadings. (*See* Def. Mem. 38-39.) In fact, some of the cases they rely on do not even arise under Rule 23: *Grayson v. K Mart Corp.*, 79 F.3d 1086 (11th Cir. 1996), and *Sperling v. Hoffman-La Rouche*, 118 F.R.D. 392 (D. N.J. 1988), arose under the Age Discrimination in Employment Act (ADEA) where plaintiffs sought to proceed as a "class" *not* under Rule 23, but under 26 U.S.C. § 216(b). *See K Mart*, 79 F.3d at 1090; *Sperling*, 118 F.R.D. at 399 ("Whatever nomenclature is used, however, it is clear that the

maintenance of ADEA representative claims … is governed by § 216(b) and not Rule 23.") In ADEA representative claims, the courts favor proof of some factual basis for the claims of employee discrimination claims before engaging in the resource-intensive notice provisions required by the statute. *See i.d.* at 407 (finding plaintiff made sufficient showing of "similarly situated" plaintiffs to earn court-facilitated notice of litigation).

Defendants also rely on *Morrison v. Booth*, 763 F. 2d 1366, 1371 (11th Cir. 1985), which states that, "[w]hile plaintiffs need not prove the merits of their claims at this stage, they must provide more than bare allegations that they satisfy the requirements of Rule 23 for class certification. Plaintiffs must show some nexus with the alleged class." Plaintiffs have not relied on "bare allegations that they satisfy the requirements of Rule 23"; they have provided detailed factual allegations showing that they meet those requirements.

Nor do the other cases cited by Defendants support their premise. *See Mills v. Foremost Ins. Co.*, 511 F.3d 1300, 1309 (11th Cir. 2008) ("In some instances, the propriety *vel non* of class certification can be gleaned from the face of the pleadings"); *Valley Drug Co. v. Geneva Pharmaceuticals, 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."). In fact, the language which Defendants cite from *Valley Drug* is a quotation from *Jones v. Diamond*, 519 F.2d 1090, 1099 (5th Cir. 1975), where prisoners sought class certification for claims of race discrimination. The court of appeals instructed that "[i]n class actions, particularly in the civil rights field, the general rules on burden of proof must not be applied rigidly or blindly," and advised the lower courts, "[a]t this juncture, unless a claim is patently frivolous, (the district court) should ask itself: assuming there are important rights at stake, what is the most sensible approach to the

class determination issue which can enable the litigation to go forward with maximum effectiveness from the viewpoint of judicial administration?" *Id.* (citation omitted).

C. Plaintiffs' Allegations Satisfy the Requirements of Rule 23(a)

1. The "impracticability of joinder" requirement is satisfied.

Plaintiffs ask the Court to certify a class of all prisoners diagnosed with HIV in the custody of ADOC, now and in the future. Defendants do not dispute that there are currently some 260 prisoners with HIV in ADOC custody. They nonetheless claim that Plaintiffs have not established the requirement of Rule 23(a)(1) that "the class is so numerous that joinder of all members is impracticable." (Def. Mem. 40-49.)

In fact, not only the number of class members but also the nature of the Plaintiffs' claim makes this case particularly suitable for treatment as a class action. "In assessing impracticability, 'courts should take a common-sense approach which takes into account the objectives of judicial economy and access to the legal system.'" *Bradley v. Harrelson*, 151 F.R.D. 422, 426 (N.D. Ala. 1993) (certifying a class of prison inmates with serious mental illness even though "the potential class size is small and somewhat undefined") (quoting 1 Herbert B. Newberg, *Newberg on Class Actions* § 3.03 (2d ed. 1985)).

Thus, for example, in *Weaver v. Reagen*, 701 F. Supp. 717, 721 (W.D. Mo. 1988), the district court certified a class consisting of "[a]ll persons in Missouri who would have or will be determined eligible for Medicaid and who are infected with [HIV] and whose physicians have or will in the future prescribe the drug Retrovir for their treatment." There were only some 61 Medicaid recipients in Missouri with HIV who had requested Medicaid coverage for Retrovir (AZT). Of those individuals, only six were denied Medicaid coverage because they failed to meet defendants' criteria. The court held that the plaintiffs satisfied the numerosity requirement

of Rule 23(a)(1) because "plaintiffs seek to represent not only those persons with AIDS who are currently being denied Medicaid coverage for AZT, but also those persons with AIDS who will be denied Medicaid coverage for AZT in the future. Since joinder of these unknown persons is impracticable, then the numerosity requirement is satisfied." *Id.*

There are compelling practical reasons for granting class status in prison cases for injunctive relief, where the proposed class includes not only current prisoners but future prisoners as well. In any given year, many prisoners enter and depart the system, some for a relatively short time. As Defendants point out (Def. Mem. 6, 21), in the few months since this lawsuit was filed ADOC has released four of the original named plaintiffs (James, Stagner, Dotson, and Hicks) and they state they are about to release two more. Plaintiffs have already amended their Complaint once to add new class representatives and remove those who have been released from prison and it is foreseeable that over the course of the litigation new releases and admissions may again require the substitution of new class representatives.

The fluid nature of the class, and the inclusion in the class of future prisoners whose identities cannot now be ascertained, makes joinder of all class members not merely impracticable but impossible. Indeed, in prison conditions cases the federal courts routinely find the "impracticability of joinder" requirement satisfied because of the impossibility of identifying future class members and the risk of mootness. *See, e.g.*, *Stewart v. Winter*, 669 F.2d 328, 334 (5th Cir. 1982) (stating that "class certification ensures the presence of a continuing class of plaintiffs with a live dispute against prison authorities"); *Johnson v. City of Opelousas*, 658 F.2d 1065, 1069-70 (5th Cir. 1981) (holding that district court abused its discretion in denying class certification because it failed to consider risk of mootness in litigation); *Skinner v. Uphoff*, 209 F.R.D. 484, 488 (D. Wyo. 2002) (finding certification appropriate for class of current and future

prisoners seeking injunctive relief; "[a]s members *in futuro*, they are necessarily unidentifiable, and therefore joinder is clearly impracticable."); *see also Monaco v. Stone*, 187 F.R.D. 50, 61 (E.D.N.Y 1999) (fluidity of class of criminal defendants makes certification particularly appropriate); *Dean v. Coughlin*, 107 F.R.D. 331, 332 (S.D.N.Y. 1985) ("the fluid composition of a prison population is particularly well-suited for class status"); *Andre H. v. Ambach*, 104 F.R.D. 606, 611 (S.D.N.Y. 1985) ("The fact that the [detention center] population … is constantly revolving established sufficient numerosity to make joinder of the class members impracticable"); *Green v. Johnson*, 513 F. Supp. 965, 975 (D. Mass. 1981) (certifying class of prisoners "in light of the fact that the inmate population at these facilities is constantly revolving").

Defendants contend nevertheless that the numbers in the class Plaintiffs seek to represent are too small to meet the "impracticability of joinder" requirement, because "the putative class members likely affected" by ADOC's segregation policy "are not numerous." (Def. Mem. 42.) In support of this point Defendants point out that the Amended Complaint identifies only one Plaintiff barred by the HIV policy from food service jobs; only five or six Plaintiffs who are categorically barred by ADOC's segregation policy from the Honor Dorm, the Senior Dorm, the Pre-release Dorm; and only five or six barred by the HIV policy from other prisons where desirable programs not available at Limestone and Tutwiler are offered. (Def. Mem 43.)

Defendants argue, further, that out of the class of some 260 prisoners with HIV, over 180 prisoners are ineligible for transfer to a work release center based exclusively on their security classification --and therefore *ipso facto* that the remainder of the class possibly eligible for transfer to a work release center cannot be "numerous." (Def. Mem. 45.) And even though Defendants have conceded that prisoners with the security classification "minimum-out" or

"minimum-community" are eligible for transfer to work release facilities and community work centers (Def. Mem. 12), and that at least five prisoners with HIV currently have that security classification (Def. Mem. 44) including Plaintiff Dwight Smith (Affidavit of Stephanie Atchinson (Doc. 47-1) ¶ 4), Defendants nonetheless make the cryptic assertion that "all of the HIV-inmates incarcerated at Limestone, currently and in the future, are not eligible for transfer to [Decatur Work Release] and, therefore, cannot be members of any purported class" (Def. Mem. 44).

Finally, Defendants contend that, since "Plaintiff John Hicks was the only Named Plaintiff specifically raising issues relative to food service jobs," "this claim is necessarily extinguished" because John Hicks is no longer incarcerated. (Def. Mem. 48.)

The Court should reject Defendants' contention that every issue raised by the Amended Complaint is a separate "claim" requiring separate satisfaction of the numerosity requirement. Plaintiffs are aggrieved by a unitary policy: ADOC's decision to discriminate against prisoners with HIV on the basis of their disability and to categorically segregate them from other prisoners, in violation of the ADA and the Rehabilitation Act. The segregation policy manifests itself in a multitude of discriminatory ways, including the categorical exclusion of Plaintiffs and other qualified prisoners with HIV from many programs, services, and facilities available to prisoners who do not have HIV (*see, e.g.*, Amended Complaint (Doc. 31) ¶¶ 17-32); the public stigmatization of Plaintiffs and all prisoners with HIV (*see, e.g.*, *id.* ¶¶ 33, 48, 70, 71, 83, 84); the provision to prisoners with HIV of services and benefits that are not as effective as those afforded prisoners who do not have HIV (*see, e.g.*, *id.* ¶ 77); the failure to administer services, programs and activities in the most integrated setting appropriate to the needs of qualified persons with HIV (*see, e.g.*, *id.* ¶¶ 82, 90-102); the utilization of criteria that have the effect of

subjecting qualified prisoners with HIV to discrimination on the basis of their HIV status (*see., e.g.*, *id.* ¶¶ 80-89); and aiding and perpetuating discrimination against prisoners with HIV (*see, e.g.*, *id.* ¶¶ 65-66, 72). It is impracticable (indeed impossible) to individually join all the prisoners in ADOC custody, now and in the future, who are and will be aggrieved by this policy.

2. The commonality requirement is satisfied.

To meet the commonality requirement of Rule 23(a)(2), there must be "questions of law or fact common to the class." Fed. R. Civ. P. 23(a)(2). This requirement is a "relatively light burden." *Vega v. T-Mobile U.S.A., Inc.*, 564 F.3d 1256, 1268 (11th Cir. 2009). It "does not require that all the questions of law and fact raised by the dispute be common." *Id*. (citing *Cox v. American Cast Iron Pipe Co.*, 784 F.2d 1546, 1557 (11th Cir. 1986)). When plaintiffs seek class certification to bring ADA claims, "[i]t is enough that the application of the alleged exclusionary policy and structural barriers comprise a common nucleus of operative facts which supports certification." *Access Now v. Ambulatory Surgery*, 197 F.R.D. at 526.

Plaintiffs allege that ADOC's HIV policy arbitrarily subjects prisoners with HIV to segregated housing and excludes otherwise qualified prisoners with HIV from programs and services that ADOC offers to prisoners who do not have HIV (for example, the faith-based honor dorm, the senior dorm, the residential substance abuse treatment program, food services jobs, access to the dining hall, access to correctional facilities for elders and correctional facilities for youth). The question of whether these HIV-discriminatory policies comply with the ADA and the Rehabilitation Act raises issues common to all class members and is susceptible to generalized proof. *Compare, e.g.*, *Murray v. Auslander*, 244 F.3d 807, 811, 812 (11th Cir. 2001) (holding that a class composed of individuals who were denied services under Florida's Medicaid waiver program met the commonality requirement, even though each class member

was eligible for a different combination of Medicaid services, since the suit was a challenge to defendants' policy of limiting the total dollar value of services any one person could receive, which "raise[d] issues common to all class members and [was] susceptible to generalized proof"); *Austin v. Hopper*, 15 F. Supp. 2d 1210, 1225 (M.D. Ala. 1998) (Thompson, J.) (finding that the requirements of commonality and typicality were clearly met where the named plaintiffs sought declaratory and injunctive relief for ADOC's practice of shackling inmates together in chain gangs; "The named plaintiffs, like many other members in the putative class, have been assigned to the chain gang in the past and could potentially be reassigned to the chain gang in the future; moreover, the requested declaratory and injunctive relief would inure to the benefit of all members of the putative class. Though there certainly may be some factual differences between the individual class members and the nature and severity of their treatment on the chain gang, such individual differences do not defeat certification because there is no requirement that every class member be affected by the institutional practice or condition in the same way."); s*ee also, e.g.*, *Bradley*, 151 F.R.D. at 426 (noting, in certifying class of mentally ill prisoners, that "there is no requirement that every class member be affected by the institutional practice or condition in the same way").

Defendants argue that Plaintiffs nevertheless fail to satisfy Rule 23(a)(2)'s commonality requirement because "their claims necessarily require individualized inquiries." (Def. Mem. 56.) Obviously, prison officials do not assign any prisoner to any program without an "individualized inquiry" into whether that assignment would be appropriate under the applicable classification principles, particular program eligibility criteria, and similar considerations. Plaintiffs' claim is that they are denied the "individualized inquiry" that Defendants employ for prisoners without HIV: instead, Defendants categorically exclude all

prisoners with HIV from a host of programs and services for which they may be qualified, *without* any "individualized inquiry" – but simply because they have HIV.

Defendants specifically argue that Plaintiffs cannot meet the commonality requirement regarding Defendants' discriminatory policies in transferring prisoners with HIV to work release centers, because "the decision to transfer any particular inmate (even those who are not HIV-positive) constitutes an individualized decision[], which is rendered on a case-by-case basis." (Def. Mem. 56.) Similarly, Defendants argue that Plaintiffs cannot "state a claim for … alleged disciplinary treatment" because "the Named Plaintiffs rely upon individual complaints involving individualized circumstances." (Def. Mem. 58-59.)[1]

Defendants' entire "individualized inquiry" argument depends upon a misapplication of cases for damages arising under *Rule 23(b)(3)* -- rather than cases where plaintiffs, as here, seek purely equitable relief and certification under Rule 23(b)(2).[2] The "individualized inquiry"

[1] Plaintiffs allege that one of the many manifestations of ADOC's discriminatory segregation policy is the difference in its treatment of prisoners who have an irreconcilable personal difference with another prisoner. In the case of prisoners who do not have HIV, ADOC's solution is simply to house the quarreling prisoners in separate dorms. In the case of prisoners with HIV, however, ADOC has a policy of locking up in isolation cells all prisoners who have irresolvable personal conflicts with another. (Amended Complaint (Doc. 31) ¶¶ 72-74.) Defendants have not disputed that this is ADOC policy and practice.

[2] Unlike Rule 23(b)(3), which is the traditional vehicle for opt-out damages actions, Rule 23(b)(2) was "intended primarily to facilitate civil rights class actions, where the class representatives typically sought broad injunctive relief against discriminatory practices." *Holmes v. Cont'l Can Co.*, 706 F.2d 1144, 1155 (11th Cir. 1983) (quoting *Penson v. Terminal Transp. Co., Inc.*, 634 F.2d 989, 993 (5th Cir. 1981)). Class certification under Rule 23(b)(2) is the traditional vehicle for challenging systemic unlawful prison practices. "Realistically, class actions are the only practicable judicial mechanism for the cleansing reformation and purification of these penal institutions." *Jones v. Diamond*, 519 F.2d 1090, 1097 (5th Cir. 1975). *And see Austin v. Hopper*, 15 F. Supp. 2d 1210, 1229 (M.D. Ala. 1998) ("Class certification under Rule 23(b)(2) is particularly appropriate in the prison litigation context where only injunctive and declaratory relief are sought.") (Thompson, J.); *Bradley*, *supra*, 151 F.R.D. at 427 (certifying under Rule 23(b)(2), a class of all acutely and severely mentally ill present and future prisoners

passages Defendants quote in support of their argument do not even refer to the Rule 23(a)(2) commonality requirement, but rather to the much more stringent "predominance" requirement of Rule 23(b)(3), that "questions of law or fact common to the members of the class predominate over any questions affecting only individual members[.]" Plaintiffs here seek certification as a Rule 23(b)(2) class requesting only injunctive relief, not a Rule 23(b)(3) class seeking damages.

Thus, Defendants' reliance on *Rutstein v. Avis Rent-A-Car Systems, Inc.*, 211 F. 3d 1228, 1240 (11th Cir. 2000), for the proposition that "liability for damages is a necessarily individualized inquiry," (Def. Mem. 54) is completely misplaced. Quoting *Rutstein*, Defendants argue that "individualized inquiries 'demonstrate the profoundly individualistic nature of each plaintiffs' claim for damages and the complete lack of judicial economy in certifying this case as a class action'" (Def. Mem. at 54). Plaintiffs here do not seek damages. Moreover, the *Rutstein* court was referring not to the commonality requirement of Rule 23(a) but rather to the "predominance" requirement in damages actions certified under Rule 23(b)(3). The *Rutstein* court explained that the Rule 23(b)(3) requirement that "common questions of law or fact predominate" means that "the issues in the class action that are subject to generalized proof, and thus applicable to the class as a whole, must predominate over those issues that are subject only to individualized proof." *Rutstein*, 211 F.3d at 1233 (collecting and quoting cases). The court noted that the Rule 23(b)(3) "predominance inquiry … is 'far more demanding' than Rule 23(a)'s commonality requirement." *Id.* at 1233.

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at ADOC's Kilby Correctional Facility; certification under Rule 23(b)(2) was appropriate because the plaintiffs challenged "deficiencies in the system for delivering mental health care which affect the entire class.")

The other "individualized inquiry" cases Defendants cite (Def. Mem. 53-56) are likewise inapposite. The language Defendants quote from *Cooper v. Southern Co.*, 390 F.3d 695, 722-723) (11th Cir. 2004) (Def. Mem. 55) refers to the Rule 23(b)(3) predominance requirement, not the Rule 23(a)(1) commonality requirement. The same is true of *Klay v. Humana, Inc.*, 382 F.3d 1250, 1263 (11th Cir. 2004) (ruling under 23(b)(3) that though one "issue of law is common to all breach of contract claims, it is far outweighed by the individualized issues of fact pertinent to these claims"), *Jackson v. Motel 6 Multipurpose, Inc.*, 130 F.3d 999, 1006 (11th Cir. 1997) (finding individual issues to predominate under 23(b)(3)), *Andrews v. American Tel. & Tel. Co.*, 95 F.3d 1014, 1023 (11th Cir. 1996) (finding no error in district court's application of 23(a) but that court abused its discretion in certifying class under 23(b)(3)), *Sikes v. Teleline*, 281 F.3d 1350, 1358, 1368 (11th Cir. 2002) (holding district court abused its discretion "by erroneously determining that common issues of law or fact would predominate over individual issues" in order to certify class under 23(b)(3)), and *Kerr v. City of West Palm Beach*, 875 F.2d 1546, 1557 (11th Cir. 1989) (proceeding under 23(b)(3) where court stated "[w]ith regard to the second of these requirements—commonality—Rule 23 specifies that 'the questions of law or fact common to the members of the class [must] predominate over any questions affecting only individual members.'").

Defendants cite a number of cases for the proposition that "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." (Def. Mem. 55 n.18.) There is, however, no difficulty whatsoever in determining class membership in the case before this Court. *See* Part I. A., *supra*. *Compare Access Now, Inc. v. AHM CGH, Inc.*, 2000 WL 1809979 at *1 (S.D. Fla. 2000) (finding it "administratively feasible to determine whether an individual is a

member of the Plaintiff Class" for certification under Rule 23(b)(2), "[s]ince putative class extends to all individuals with disabilities, as defined by the ADA.") Furthermore, the cases Defendants cite here involved certification under Rule 23(b)(3) and its more searching standard that a class action be "superior to other available methods for fairly and efficiently adjudicating the controversy." Fed. R. Civ. P. 23(b)(3). That was the standard of review applied in both *Fisher v. Ciba Specialty Chemicals Corp.*, 238 F.R.D. 273, 301 (S.D. Ala. 2006) (denying class certification under 23(b)(3) where "number of individualized determinations required to determine class membership becomes too administratively difficult") and *Perez v. Metabolife International Inc.*, 218 F.R.D. 262, 269 (S.D. Fla. 2003) (same).

3. The typicality requirement is satisfied.

To meet the typicality requirement, the claims of the named plaintiffs must be "typical of the claims or defenses of the class." Fed. R. Civ. P. 23(a)(3). Defendants argue that Plaintiffs do not satisfy the typicality requirement because "the purported class identified by the Named Plaintiffs (i.e. all HIV positive inmates) is diverse," "[t]he HIV-positive population is not susceptible to the broad generalities employed by the Named Plaintiffs," and "it is difficult to even identify a 'class' of persons who claim to be similarly grieved to the named Plaintiffs in some manner." (Def. Mem. 60.)

Defendants' "typicality" argument is untenable. The burden of showing typicality is not an onerous one. *See Murray v. Auslander*, 244 F.3d 807, 811 (11th Cir. 2001); *Paxton v. Union National Bank*, 688 F.2d 552, 562 (8th Cir. 1982); *Taylor v. Flagstar Bank, FSB*, 181 F.R.D. 509, 517 (M.D. Ala. 1998) (Albritton, C.J.) (The typicality requirement is "somewhat of a low hurdle."). The essence of the typicality inquiry is "whether named representatives' claims have the same essential characteristics as the claims of the class at large." *Appleyard v. Wallace*, 754

F.2d 955, 958 (11th Cir. 1985) (where plaintiffs challenged Alabama policies setting criteria for Medicaid eligibility, which made the plaintiffs ineligible for Medicaid, the court found that the named plaintiffs satisfied the typicality requirement even though they suffered from different medical conditions because "[t]he similarity of the legal theories shared by the plaintiffs and the class at large is so strong as to override whatever factual differences might exist and dictate a determination that the named plaintiffs' claims are typical of those of the members of the putative class.").

The claims of the named Plaintiffs have the same essential characteristics as the claims of the class at large. Plaintiffs allege that ADOC discriminates against every member of the class, including the named Plaintiffs, by segregating them in separate HIV housing at Limestone (for men) or Tutwiler (for women), publicly disclosing their HIV status, stigmatizing them, requiring all men with HIV to wear a white armband, and categorically excluding them from a variety of programs, services, and facilities for which they are otherwise qualified. That the programs and services for which they are qualified may differ from plaintiff to plaintiff does not defeat a finding of typicality. *See Appleyard*, 754 F.2d at 958; *Austin v. Hopper*, 15 F. Supp. 2d at 1225.

4. The "adequacy of representation" requirement is satisfied.

Defendants assert that the named plaintiffs cannot fairly and adequately represent the class because of "the existence of substantial conflicts of interest" between the named plaintiffs and other class members. (Def. Mem. 62.) Defendants do not claim to know of any particular class member or categories of class members whose interests are opposed to those of the named Plaintiffs; rather, Defendants hypothesize that there could be class members who would not want ADOC to change its segregation policy since the end of the segregation policy might result in the loss of special privileges that ADOC allegedly provides for prisoners with HIV. (*See* Def. Mem.

64.)

Defendants support this hypothesis with a statement from Defendant Billy Mitchem, Limestone's Warden, that "There is no question in my mind that many inmates housed in Limestone's Special Unit [the HIV segregation dormitories] receive benefits and have living conditions which exceed in many respects the conditions within the other housing units at Limestone." (Affidavit of Billy Mitchem (Doc. 47-2) ¶ 4.) Warden Mitchem opines that the HIV-positive prisoners have superior accommodations to other prisoners at Limestone since their segregated housing affords them greater privacy than most other Limestone prisoners enjoy; furthermore, it is an advantage for prisoners with HIV to be excluded from the dining hall, for if permitted to use the dining hall, "members of the class would face lengthened wait time for meals." (*Id.*) Indeed, "to a large extent," ADOC chose the current segregated HIV dormitories at Limestone in order to accommodate "a request by HIV-positive inmates involved in the Leatherwood [case]." (*Id.* ¶ 3.)

To defeat the adequacy requirement of Rule 23, however, a conflict must be more than merely speculative or hypothetical. Speculative conflict should be disregarded at the class certification stage. 1 William Rubenstein, et. al., Newberg on Class Actions § 3:25 (4th ed.); *see also Association for Disabled Americans v. Amoco*, 211 F.R.D. at 463 ("Adequate representation is presumed in the absence of contrary evidence."); *Cook v. Rockwell International Corp.*, 151 F.R.D. 378, 386 (D. Colo. 1993) ("the favorable presumption arises because the test involves future conduct of persons, which cannot fairly be prejudged adversely") (quoting Newberg on Class Actions § 7.24 (3d ed. 1992)) *abrogated on other grounds by Jackson v. Unocal Corp.*, 231 P.3d 12 (Colo. Ct. App. 2009).

Even if Warden Mitchell's views accurately represented the views of one or more class members, "not every potential disagreement between a representative and the class members will stand in the way of a class suit. … The conflict that will prevent a plaintiff from meeting the Rule 23(a)(4) prerequisite must be fundamental. It must go to the specific issues in controversy." *Id.* at § 3:26; s*ee also Valley Drug*, 350 F.3d at 1189 ("[T]he existence of minor conflicts alone will not defeat a party's claim to class certification: the conflict must be a 'fundamental' one going to the specific issues in controversy. A fundamental conflict exists where some party members claim to have been harmed by the same conduct that benefitted other members of the class." (internal citations omitted)).

Assuming the correctness of Warden Mitchem's view that the housing ADOC provides for prisoners with HIV is superior to the housing it provides for other prisoners at Limestone, the potential disagreement which Defendants foresee is not only highly speculative, it is simply not fundamental. Whether or not Plaintiffs are permitted to pursue their claim as a class action, nothing currently stands in the way of ADOC moving Limestone prisoners with HIV to different (and possibly worse) housing. On the other hand, if Plaintiffs prevail on their class claims, class members might be eligible for transfer to other prisons where the housing would be preferable to any housing at Limestone. Potential conflicts relating to the particular relief that might be granted in the event the plaintiffs succeed on common claims of liability on behalf of the class will not bar a finding of adequacy of representation. *See generally* 1 Newberg on Class Actions § 3:25 & n.4 (collecting cases); *see also Green v. Cady*, 90 F.R.D. 622, 624 (E.D. Wis. 1981) (rejecting defendants' contention that because the plaintiff inmates complain of the hazards to them arising from fires set by other inmates, an inmate class would contain antagonistic claims; "The complaint alleges that the plaintiffs' risk of exposure to the hazards of fire is unnecessarily

high due to certain actions taken and policies followed by the defendants. . . . Rule 23(a) is liberally applied in constitutional rights cases. *See* 7 Wright and Miller s 1771.")

Furthermore, Plaintiffs seek to certify a class under Rule 23(b)(2), which "does not mandate that all members of the (b)(2) class be aggrieved by or desire to challenge the defendant's conduct." *Jones v. Diamond*, 519 F.2d at 1100 (internal cites omitted). Rule 23(b)(2) does require "that the conduct or lack of it which is subject to challenge be premised on a ground that is applicable to the entire class." *Id.* The conduct challenged here – ADOC's policy of categorical housing segregation – is applicable to the entire class.

The cases Defendants cite to support their argument regarding conflict of interest (Def. Mem. 61-63) are completely inapposite. Almost all of them involve not Rule 23(b)(2) classes, like Plaintiffs', but Rule 23(b)(3) classes, where the potential for conflict is heightened by financial interests in the litigation. Rule 23(b)(3) certification "invites a close look at the case before it is accepted as a class action," since Rule 23(b)(3) was "framed for situations in which 'class-action treatment' is not as clearly called for' as it is in Rule 23(b)(1) and (b)(2) situations." *Amchem Products, Inv. v. Windsor*, 521 U.S. 591, 615 (1997).

In *London v. Walmart Stores, Inc.*, 340 F.3d 1246 (11th Cir. 2003) (Def. Mem. 61), plaintiffs sought certification under Rule 23(b)(3) in their suit for damages for violations of the Truth in Lending Act and state insurance regulations. The Eleventh Circuit held that the plaintiff had a serious potential conflict with other class members because of his close personal and financial ties with the putative class counsel, which "cast[] doubt on London's ability to place the interests of the class above that of class counsel," and particularly so because the attorney's fees for the lawsuit would far exceed the class representative's recovery. In such circumstances, "courts fear that a class representative who is closely associated with the class attorney [will]

allow settlement on terms less favorable to the interests of absent class members." *Id.* at 1254-55.

In re Healthsouth Corp. Sec. Litig., 213 F.R.D. 447 (N.D. Ala.) (Def. Mem. 62), also a Rule 23(b)(3) damages case, involved a claim of securities fraud. The proposed class included three separate but distinct groups: purported class members who obtained shares of HealthSouth stock on the open market; former owners of Horizon stock or options whose interests were converted to HealthSouth stock or options; and former owners of NSC stock or options whose interests were converted to HealthSouth stock or options. The court decided that there were conflicts of interest between the class members who purchased their stock on the open market and the class members who acquired their stock via the Horizon and NSC mergers since the class members who held stock at the time of the mergers actually benefitted from the alleged inflated share price, while the class members who acquired stock through the mergers were harmed when their more valuable stock was exchanged for the allegedly inflated Healthcare stock –which the court characterized as a "direct conflict … that goes to the very basis of plaintiffs' claims --using inflated stock dollars to purchase NSC and Horizon." *Id.* at 463 n.13.

Valley Drug, 350 F.3d 1181, on which Defendants heavily rely (Def. Mem. 62-63) likewise involved plaintiffs seeking certification under Rule 23(b)(3) and money damages from an anti-trust suit. The issue presented was "whether the 'adequacy of representation' requirement could be satisfied by the named representatives despite the fact that the most significant members of the certified class [whose claims allegedly constituted over 50 percent of the challenged transactions] arguably experienced a net gain from the conduct alleged to be illegal by the named representatives." 350 F.3d at 1188. The Eleventh Circuit emphasized that divergent economic interests were the critical factor: "This circuit is not alone in interpreting

Rule 23(a)(4) to preclude class certification where the economic interests and objectives of the named representatives differ significantly from the economic interests and objectives of the unnamed class members. To our knowledge, no circuit has approved of class certification where some class members derive a net economic benefit from the very same conduct alleged to be wrongful by the named representatives of the class." *Id.* at 1190.

None of the other cases Defendants rely on (Def. Mem. 63) provide any better support for their claim that Plaintiffs have a conflict of interest. In *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797 (1985), investors in a gas company brought a Rule 23(b)(3) class action for damages, to recover interest wrongly withheld. The Supreme Court rejected the defendants' due process challenge to the Rule 23(b)(3) opt-out provisions, and stated that its holding was limited "to those class actions which seek to bind known plaintiffs concerning claims wholly or predominately for money judgments. We intimate no view concerning other types of class actions, such as those seeking equitable relief." *Id.* at 811-12 & n.3. In *Falcon*, 457 U.S. 147, the Court declined to rule on the conflict of interests issue, holding that the plaintiff failed to meet the commonality and typicality requirements. *Id.* at 158 n.13.

Defendants' reliance on *General Tel. Co. of Northwest, Inc. v. EEOC*, 446 U.S. 318 (1980) and *Prado-Steiman ex rel. Prado v. Bush*, 221 F.3d 1266, 1279 (11th Cir. 2000) (Def. Mem. 63) is likewise misplaced. *General Tel. Co.* was not brought under Rule 23 as a class action, class certification was not at issue, and the passage Defendants cite is dictum concerning the economic interests in employment giving rise to conflicts among class members. The language Defendants cite from *Prado-Steiman* refers to the typicality requirement, not the requirement of adequacy of representation.

Defendants cite *Amchem Products*, 521 U.S. at 625-26, for the proposition that Plaintiff were required to show what steps they took to uncover class conflicts. (Def. Mem. 63.) In *Amchem*, the Supreme Court was asked to review certification under Rule 23(b)(3) for a class of current and future victims of asbestos seeking money damages for asbestos exposure. Asbestos products manufacturers stipulated to a proposed global settlement of claims by persons exposed to asbestos, and the stipulation was approved by the district court. The manufacturers then moved to enjoin actions against them by individuals who had failed to timely opt out of class, and the district court granted the injunction. Reversing, the Supreme Court found the conflict of interest among class members was significant: for some class members the most pressing goal was immediate payment while others would benefit more from receiving installment payments, a goal that "tug[ged] against the interest of exposure-only plaintiffs in ensuring an ample, inflation-protected fund for the future;" while unnamed plaintiffs faced total foreclosure of future claims. *See* 521 U.S. at 627. The Court determined that when "confronted with request for settlement-only class certification . . . specifications of the rule establishing requirements for certification, which are designed to protect absentees by blocking unwarranted or overbroad class definitions, demand undiluted, even heightened, attention in settlement context." *Id.*

II. THE COURT SHOULD NOT STAY DISCOVERY OR CLASS CERTIFICATION

A. The Court Should Not Stay Class Certification Proceedings Pending Decision on the Motion to Dismiss

Defendants ask the Court "to exercise its broad discretion to stay the class certification proceedings" until the Court has ruled on Defendants' Motion to Dismiss, "in order to promote judicial economy and preserve the parties' resources while not prejudicing the named Plaintiffs." (Def. Mem. 30.)

It is not apparent, however, that in this case there would be any significant judicial economy or saving of parties' resources in postponing proceedings on the class certification motion until decision on the motion to dismiss. Both motions have already been briefed and all that remains is oral argument; argument on both motions is scheduled for September 16, 2011, and the Court will accordingly have the benefit of the parties' briefs and arguments on both motions before ruling on either. Of course, if the Court decides after oral argument to grant Defendants' motion to dismiss, the time expended by the Court and the parties for oral argument on Plaintiffs' motion for class certification will prove to have been unnecessary, but that potentially unnecessary expenditure of effort would be relatively insignificant and no greater than the extra resources that would be required for a subsequent oral argument on class certification in the event the Court denies the motion to dismiss.

B. The Court Should Not Stay Discovery Pending Decision on Motion to Dismiss

Defendants argue that the Court should stay all discovery until the Court has decided their motion to dismiss. (S*ee* Def. Mem. 31-34.) But "a pending motion to dismiss is not ordinarily a situation that in and of itself would warrant a stay of discovery. . . ." 10A Federal Procedure, Lawyers Edition § 26:337 (2011). Unless resolution of a motion will "dispose of the entire case," requests to stay discovery are "rarely appropriate." *McCabe v. Foley*, 233 F.R.D. 683, 685 (M.D. Fla. 2006); *see also Gray v. First Winthrop Corp.*, 133 F.R.D. 39, 40 (declining to stay discovery pending the result of defendant's motion to dismiss where plaintiff's complaint was neither "utterly frivolous" nor a "fishing expedition"). Motions to stay discovery so that a court may rule on a motion to dismiss are "not favored," since they may "create case management problems which impede the Court's responsibility to expedite discovery and cause unnecessary litigation expenses and problems." *Feldman v. Flood*, 176 F.R.D. 651, 652 (M.D.

Fla. 1997) (quoting *Simpson v. Specialty Retail Concepts, Inc.*, 121 F.R.D. 261, 263 (M.D.N.C. 1988)). On motions to stay discovery, the moving party must bear the burden and show "good cause and reasonableness" for any stay. *McCabe v. Foley*, 233 F.R.D. at 685. Defendants have not shown good cause for a stay.

Defendants rely primarily on *Chudasama v. Mazda Motor Corp.*, 123 F.3d 1353 (11th Cir. 1997). *Chudasama* does not, however, establish a per se rule; it stands for the proposition that where courts can avoid unnecessary protracted discovery battles by ruling on a motion to dismiss they should not delay such rulings, especially where plaintiffs' claims do not appear meritorious. *See Schreiber v. Kite King's Lake, LLC*, 2010 WL 3909717 *1 (M.D. Fla. 2010) ("[*Chudasama*] does not stand for the proposition that all discovery should be stayed pending a decision on a motion to dismiss. … Instead, [*Chudasama*] and its progeny stand for the much narrower proposition that courts should not delay ruling on a likely meritorious motion to dismiss while undue discovery costs mount." (citations omitted)). Plaintiffs here have not yet even initiated discovery, and there is no reason to suppose that the Court will long delay deciding the motion to dismiss, particularly if it doubts that Plaintiffs' claims are meritorious.

Defendants contend that it is especially appropriate to delay discovery pending a motion to dismiss in a purported class action, since "in a class action, every claim for relief significantly enlarges the scope for discovery," citing *Cotton v. Massachusetts Mutual Life Insurance Co.*, 402 F.3d 1267, 1292 (11th Cir. 2005). (Def. Mem. 34.) *Cotton* does not support that proposition. The *Cotton* court noted that "every claim has the potential to enlarge the scope and cost of discovery," 402 F.3d at 1292, without suggesting that this is especially true in class action cases, and it found that the district court should have ruled on the defendants' preemption motion because that would have foreclosed the plaintiffs' state law claims. Defendants' reliance on

J&G Investments, LLC v. Fineline Properties, Inc., 2007 WL 928642 *1 (N.D. Ohio Mar. 27, 2007), as authority for a stay of discovery (Def. Mem. at 34) is also misplaced. That case arose under a statute explicitly authorizing stays of discovery in class action securities claims, and the court decided not to extend this rule beyond class actions to other private securities litigation. *J& G Investments*, 2007 WL 928642 at *5.

C. Defendants Are Not Entitled to Prior Discovery on Class Certification

Defendants contend that while Plaintiffs should be barred from conducting any merits discovery until the motion to dismiss and the class certification motion are decided, Defendants cannot be expected to adequately brief and argue the motion for class certification until they have conducted discovery on the issue of class certification. (Def. Mem. 34-35.) There is no basis for this contention.

Plaintiffs have alleged a multitude of specific facts that show how they meet the requirements for certification as a Rule 23(b)(2) class. Defendants do not need discovery to dispute those allegations since any information that would contradict these allegations is entirely within the custody and control of Defendants. Unlike Plaintiffs, Defendants already have complete access to ADOC policies, rules and procedures; to program descriptions and eligibility requirements; and to the classification, disciplinary and medical records of each and every one of the 260 members of the putative plaintiff class. Defendants have not pointed to a single allegation that they cannot dispute without discovery from Plaintiffs. Defendants do provide a laundry list of "multiple questions to consider" in determining whether a prisoner is eligible for work release ("is the inmate serving a sentence of life without parole? What is the inmate's security classification? Does the inmate have any recent disciplinary actions? Does the inmate

have a history of escaping?") (Def. Mem. 57) but the answers to Defendants' questions are contained in documents within ADOC's exclusive control.

Although the Court has discretion to allow prior discovery on the issue of class certification while staying merits discovery,[3] this sequence is not favored, for a variety of reasons:

> Discovery on the merits should not normally be stayed pending so-called class discovery, because class discovery is frequently not distinguishable from merits discovery, and classwide discovery is often necessary as circumstantial evidence even when the class is denied. Such a discovery bifurcation will often be counterproductive in delaying the progress of the suit for orderly and efficient adjudication.

3 Newberg on Class Actions § 7:8 (4th ed.).

Without explaining why the usual rule should not apply here, Defendants merely assert that they are "entitled" to prior discovery on the issue of class certification before permitting merits discovery, and that it would be "entirely premature" to certify the class without permitting them this discovery on the issue of class certification. (Def. Mem. 35.) This contention stands the general rule on its head. Since plaintiffs have the burden of showing they meet the requirements of Rule 23 for class certification, the courts should ordinarily not *deny* class certification without permitting plaintiffs to engage in discovery, at least when the pleadings on their face do not show noncompliance with Rule 23 or when the satisfaction of the Rule 23 requirements may have depended on matters within the knowledge or possession of the

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[3] "The amount of discovery on a motion for class certification is generally left to the trial court's considerable discretion." 32B Am. Jur. 2d Federal Courts § 1584. Where the court has sufficient information to render a decision on class certification, "discovery will be denied." *Id.*; *see also* Manual for Complex Litigation § 21.14 (4th ed.) ("Discovery may not be necessary when claims for relief rest on readily available and undisputed facts or raise only issues of law."); *Huff v. N. D. Cass Co. of Alabama*, 485 F.2d 710, 713 (5th Cir. 1973) (courts may determine the maintainability of a class under Rule 23 solely "on the basis of the pleadings.")

defendant. *See Mills v. Foremost Ins. Co.*, 511 F.3d 1300, 1309 n.14 (11th Cir. 2008) (reversing district court's denial of class certification and ordering discovery).

Defendants here ask the Court to adopt the contrary proposition -- that certification cannot be *granted* without allowing the defendants discovery. The cases they cite do not support that proposition.

Defendants quote *Hudson v. Delta Airlines, Inc.*, 90 F.3d 451, 458 n.16 (11th Cir. 1996) for the general proposition that prior discovery "is often necessary to sufficiently define the proper scope of an alleged class or subclass." (Def. Mem. 34). In *Hudson*, the plaintiffs were retirees who sought class certification of a claim involving the right to ERISA benefits. The plaintiffs, who failed to provide the court with the operative ERISA benefits plan after three years of discovery, were denied class certification. The court reasoned,

> Although 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. Here, the plaintiffs moved for class treatment prior to conducting any discovery, traveling solely on the broad allegations of the complaint. Such an approach may be acceptable in some cases, but this is not one of them. Because the entitlement to ERISA benefits is controlled by formal plan documents, the analysis of any claim arising from the alleged failure to comply with an ERISA plan must begin with an examination of those documents, which will also define the class or classes of persons governed thereby. The record in the present case shows that discovery began on August 17, 1994 and continued until March 22, 1995, when it was stayed by the district court pending the resolution of this appeal. The plaintiffs failed to make the pertinent ERISA plan documents a part of the record during this time. By suggesting that the district court may, in its discretion, reopen the class certification issue after further development of the case, we do not mean to imply that the court should do so.

90 F.3d at 458 n.16.

Similarly, at issue in *Washington v. Brown & Williamson Tobacco Corp.*, 959 F.2d 1566 (11th Cir. 1992), which Defendants quote for the proposition that "court may allow classwide

discovery on the certification issue and postpone classwide discovery on the merits" (Def. Mem. 34-35), was the entitlement of plaintiffs, not of defendants, to pre-certification discovery, to show that plaintiffs' claims were class-worthy. The Eleventh Circuit rejected the plaintiffs' argument that they were unfairly prevented from proving their class claims because the district court "failed to allow them 'virtually any classwide discovery' before denying class certification" because the district court had in fact allowed three years of class-wide discovery. *Brown & Williamson*, 959 F.2d at 1570.

Defendants cite *Rhodes v. Cracker Barrel Old Country Store, Inc.*, 213 F.R.D. 619, 673 (N.D. Ga. 2003) for the proposition that the courts "should allow … the parties to conduct discovery and adduce evidence relevant to the certification issue." (Def. Mem. 35.) The *Rhodes* court, however, did not lay down an inflexible rule that defendants are automatically entitled to pre-certification discovery. Rather, quoting the Supreme Court in *Falcon*, 457 U.S. 147, it stated:

> "[T]he need for such discovery varies depending on the circumstances presented by each case . . . The class determination generally involves considerations that are enmeshed in the factual and legal issues comprising the plaintiff's cause of action. Sometimes the issues are plain enough from the pleadings to determine whether the interests of the absent parties are fairly encompassed within the named plaintiff's claim, and sometimes it may be necessary for the court to probe behind the pleadings before coming to rest on the certification question."

Rhodes, 213 F.R.D. at 673 (quoting *Falcon*, 457 U.S. at 160 (internal quotation marks and citations omitted)).

In Plaintiffs' case, "the issues are plain enough from the pleadings [that] the interests of the absent parties are fairly encompassed within the named plaintiff's claim." (*See* Memorandum in Support of Motion for Class Certification (Doc. 3) and Part I, *supra.*) It is not apparent that class discovery would be distinguishable from merits discovery, and discovery bifurcation would be counterproductive in delaying the orderly and efficient adjudication of the case. Since it is

practicable for the Court to determine the class certification issue on the pleadings, the Court should do so now.

The Court is not bound by a decision to maintain the case as a class action at this stage of the litigation, and it should resolve any doubt as to the suitability of class certification in favor of Plaintiffs. *See Jones v. Diamond*, 519 F.2d at 1098 (where the decision to certify a class is made "before the supporting facts are fully developed . . . [the court] should err 'in favor and not against the maintenance of the class action, for (the decision) is always subject to modification." (quoting *Esplin v. Hirschi*, 402 F.2d 94, 99 (10th Cir. 1968) *cert. denied*, 394 U.S. 928 (1969))). If facts emerge during the course of discovery requiring de-certification, the Court may revaluate its decision at that time. *See* Fed. R. Civ. P. 23(c)(1)(C) ("An order that grants or denies class certification may be altered or amended before the final judgment."). But in the context of civil rights suits, courts "should be loathe to deny the justiciability of class actions without the benefit of the fullest possible factual background." *Jones v. Diamond*, 519 F.2d at 1099.

CONCLUSION

For the foregoing reasons, the Court should deny Defendants' Motion to Stay and should grant Plaintiffs' Motion for Class Certification.

RESPECTFULLY SUBMITTED:

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CERTIFICATE OF SERVICE

I hereby certify that on this 15th day of August 2011, I filed a true copy of the foregoing with the Court using the CM/ECF electronic filing system, which will automatically forward a copy to counsel for the Defendants at the following addresses:

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