UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF FLORIDA
TALLAHASSEE DIVISION

JOSEPH REILLY,

Plaintiff,

v. No. 4:14-cv-397

SHERIFF OF LEON COUNTY, FLORIDA,

Defendant.

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PLAINTIFF'S RENEWED MOTION & MEMORANDUM OF LAW TO CERTIFY A CLASS

Plaintiff renews his previous motion (Doc. 2) and again moves pursuant to Fed. R. Civ. P. 23(b)(2) to certify a class comprising of "**all Florida and Maryland residents who are current and future friends, family, or correspondents of inmates incarcerated or detained in the Leon County, Florida, Jail**." Plaintiff also moves pursuant Fed. R. Civ. P. 23(g) to appoint the undersigned counsel as class counsel. Plaintiff argues as follows in support of this motion:

Introduction

Plaintiff Joseph Reilly ("Reilly") is the father of Sean Reilly, who is an inmate in the Leon County, Florida, Jail ("Jail"). Defendant Sheriff for Leon

County, Florida ("Sheriff"), runs the Jail and from June 2014 through August 2014 enforced restrictive policies and practices governing inmate mail, which adversely affected Reilly's ability to effectively communicate with his son. The Sheriff would not deliver letters enclosed in envelopes to inmates. Instead, family and friends of inmates, like Reilly, had to write to inmates on approved postcards. Plaintiff Reilly challenges the Sheriff's Postcard-Only Mail Policy as it impermissibly restricted Reilly's ability to send communications to Jail inmates like his son, in violation of the First and Fourteenth Amendments to the United States Constitution. Although the Sheriff has ceased enforcing this restrictive inmate mail policy, Reilly seeks injunctive relief to ensure that the Sheriff reinstitute the policy.

Reilly had previously moved the Court to certify a class. Pl.s' Mot. for Class Certification (Doc. 2). The Court denied this motion in order to first adjudicate the motion to dismiss the Sheriff intended to file. Order Denying without Prejudice the Motion to Certify a Class (Doc. 20). The Sheriff then filed a motion to dismiss (Doc. 22) (titled a motion for summary judgment) and the Court denied the Sheriff's motion. Order Denying the Motion to Dismiss (Doc. 33). Accordingly, now that the Court has ruled on the Sheriff's motion and a live case and controversy exists as to the requested injunctive relief, Reilly renews his motion to certify a class.

Argument

I. Principles applicable to class certification.

For a district court to certify a class action, every putative class first must satisfy the prerequisites of "numerosity, commonality, typicality, and adequacy of representation" and at least one of the alternative requirements of Rule 23(b). Fed.R.Civ.P. 23; *Mills v. Foremost Ins. Co.*, 511 F.3d 1300, 1307-08 (11th Cir. 2008) (citations omitted). Here, the putative class satisfies each of the four requirements of Rule 23(a) and—because the Sheriff would apply his unconstitutional inmate mail policies generally to the family, friends, and other correspondents of inmates—it qualifies through Rule 23(b)(2) for class certification.

Class certification is solely a procedural issue, and the court's inquiry is limited to determining whether the proposed class satisfies the requirements of Rule 23. *Eisen v. Carlisle & Jacquelin*, 417 U.S. 156, 177-78 (1974). In ruling on the motion for class certification, the court must take the substantive allegations of the complaint as true. *Drayton v. Western Auto Supply Co.*, 2002 WL 32508918, *6 (11th Cir. Mar. 11, 2002) ("It, therefore, is proper to accept the substantive allegations contained in the complaint as true when assessing Rule 23 requirements.")

II. The requirements of Rule 23(a) are satisfied.

For a class to be certified, the following requirements must be satisfied: (1) the class is so numerous that joinder of all members is impracticable; (2) there are questions of law or fact common to the class; (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class; and (4) the representative parties will fairly and adequately protect the interests of the class. Fed. R. Civ. P. 23(a). As Plaintiff demonstrates below, all four requirements of Rule 23(a) are easily met.

A. Impracticability of Joinder – Rule 23(a)(1).

Rule 23(a)(1) requires that the class be "so numerous that joinder of all members is impracticable." While there is no magic number of putative class members necessary to satisfy the numerosity standard, the Eleventh Circuit has indicated that more than forty members is generally enough to satisfy the rule. *See Cox v. Amer. Cast Iron Pipe Co.*, 784 F.2d 1546, 1553 (11th Cir. 1986).

The Jail's average daily population was 1,043 in May 2014, and there is no reason to believe that it has decreased substantially since then. *See* County Detention Facilities Average Daily Populations, attached and incorporated as

Exhibit 2-1 (filed at Doc. 2-1).[1] If each inmate corresponded with three family, friends, or other correspondents, this would total 3,129 putative class members. Although not every inmate of the Leon County Jail has correspondents, with nearly one-thousand inmates in the Jail at any one time and each inmate likely having multiple correspondents who would like to send letters to the inmates, the sheer numbers easily satisfy the numerosity requirements of Rule 23(a)(1).

In addition, a court may consider a number of other facts pertaining to numerosity, including the ease with which the class members may be identified and the nature of the action. *Zeidman v. J. Ray McDermott & Co., Inc.*, 651 F.2d 1030, 1038 (5th Cir. July 27, 1981).[2] Here, the inmates in the Jail at any one time are in constant flux and therefore so are their correspondents. While the Jail houses approximately 1,043 inmates, several thousand persons are annually arrested and booked as an inmate. Thus, the class of people who want to send letters to Jail inmates and receive uncensored mail is ever changing. The fluid nature of the class, and the inclusion in the class of future correspondents, whose identities obviously cannot now be ascertained, makes joinder of all class members not just impracticable, but literally impossible. *Phillips v. Joint Legis. Comm. on*

[1] Available at http://www.dc.state.fl.us/pub/jails/2014/05/table2.html

[2] In *Bonner v. City of Prichard*, 661 F.2d 1206, 1207 (11th Cir. 1981), the Eleventh Circuit adopted as precedent the decisions of the Fifth Circuit rendered prior to October 1, 1981.

Performance & Expenditure Review of Miss., 637 F.2d 1014, 1022 (5th Cir. 1981) (noting that future class members are necessarily unidentifiable and therefore joining them is impracticable) (quoting *Jack v. American Linen Supply Co.*, 498 F.2d 122, 124 (5th Cir.1974) (per curiam)).[3] The numerosity requirement of Rule 23(a)(1) is therefore satisfied.

B. Commonality – Rule 23(a)(2).

Rule 23(a)(2) requires that "there [be] questions of law or fact common to the class." Traditionally, commonality refers to the group characteristics of the class as a whole. *Prado-Steiman ex rel. Prado v. Bush*, 221 F.3d 1266, 1279 (11th Cir. 2000). However, this prerequisite does not mandate that all questions of law or fact are common; a single common question of law or fact is sufficient to satisfy the commonality requirement, as long as it affects all class members alike. *See In re Terazosin Hydrochloride Antitrust Litig.*, 220 F.R.D. 672, 685 (S.D. Fla. 2004). For that reason, the commonality requirement is "easily met." 1 Herbert B. Newberg, Newberg on Class Actions § 3.10, at 274 (4th ed. 2002). Indeed,

[3] *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 establishes 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").

"[c]ommonality may be established where there are allegations of common conduct or standardized conduct by the defendant directed toward members of the proposed class." *Strube v. Am. Equity Inv. Life Ins. Co.*, 226 F.R.D. 688, 695 (M.D. Fla. 2005).

In this case, the members of the proposed class are all correspondents with Jail inmates who are housed in a single facility and all of them would be subject to the Sheriff's inmate mail policies. Accordingly, there are questions of fact and law that are common to the class, including (but not limited to) the following:

1. The scope and nature of Sheriff's Postcard-Only Mail Policy.
2. The notice and opportunities the Sheriff gives to Jail inmates' correspondences whose letters the Sheriff rejected.
3. The scope and nature of the Sheriff's interest in instituting and maintaining these policies.
4. Whether the application of the Sheriff's inmate mail policies violates the correspondents' rights under the First and Fourteenth Amendments to the United States Constitution.

Reilly has alleged that the injuries and threatened injuries detailed in the Complaint—both his individual injuries and those of the putative class—stem from the Sheriff's inmate mail policies. This fact alone requires a finding of commonality. Plaintiffs need only show a "common nucleus of operative facts" to satisfy Rule 23(a)(2). *Oshana v. Coca-Cola Bottling Co.*, 225 F.R.D. 575, 581 (N.D. Ill. 2005); *In re Currency Conversion Fee Antitrust Litigation*, 224 F.R.D.

555, 562 (S.D.N.Y. 2004) ("[T]he commonality requirement does not require that each class member have identical claims as long as at least one common question of fact or law is evident"). Although class members will inevitably be affected in different ways by the Sheriff's inmate mail policies, "factual differences among the claims of the putative class members do not defeat certification." *Cooper v. Southern Co.*, 390 F.3d 695, 713 (11th Cir. 2004) (*quoting Baby Neal v. Casey*, 43 F.3d 48, 56 (3d Cir. 1994)) (*overruled on other grounds by Ash v. Tyson Foods, Inc.*, 546 U.S. 454, 457 (2006)). The controlling questions of fact and law in this case are common to the entire class. Accordingly, the commonality requirement of Rule 23(a)(2) is satisfied.

C. Typicality – Rule 23(a)(3).

Fed. R. Civ. P. 23(a)(3) requires that "the claims or defenses of the representative parties [be] typical of the claims or defenses of the class." The focus of typicality is whether the class representative's interest is aligned enough with the proposed class members to stand in their shoes for purposes of the litigation and bind them in a judgment on the merits. *See General Tel. Co. v. Falcon,* 457 U.S. 147, 156 (1982) (citation omitted); *Kornberg v. Carnival Cruise Lines, Inc.,* 741 F.2d 1332, 1337 (11th Cir. 1984); *Vega v. T-Mobile USA, Inc.,* 564 F.3d 1256, 1275 (11th Cir. 2009). "A class representative must possess the same

interest and suffer the same injury as the class members in order to be typical under Rule 23(a)(3)." *Busby v. JRHBW Realty, Inc.*, 513 F.3d 1314, 1322 (11th Cir. 2008). Thus, typicality is often met when, in proving his case, the representative plaintiff establishes the elements needed to prove the class members' case. *See Brooks v. Southern Bell Tel. & Tel. Co.*, 133 F.R.D. 54, 58 (S.D. Fla. 1990). Moreover, the "typicality requirement may be satisfied even if there are factual distinctions between the claims of the named plaintiffs and those of other class members," so long as the named representatives' claims share "the same essential characteristics as the claims of the class at large." *Appleyard v. Wallace*, 754 F.2d 955, 958 (11th Cir. 1985) (citations omitted).

Here, the claims, interests, and suffered injury for Plaintiff Reilly are identical to those of the putative class members. All class members are at risk of being subjected to the Sheriff's inmate mail policies that would adversely affect their ability to communicate with Jail inmates. Reilly's claims are based on the same legal theory as the claims of the class members – that the policies violate the free expression guarantees of the First Amendment to the United States Constitution and basic due process. The Sheriff has uniformly applied this policy to the correspondents of all inmates. The typicality requirement is met.

D. Adequacy of Representation – Rule 23(a)(4).

The fourth element of the Rule 23(a) analysis requires that the "representative parties will fairly and adequately protect the interests of the class." Fed.R.Civ.P. 23(a)(4). This requirement "involves questions [1] of whether plaintiffs' counsel are qualified, experienced, and generally able to conduct the proposed litigation, and [2] of whether plaintiffs have interests antagonistic to those of the rest of the class." *Griffin v. Carlin*, 755 F.2d 1516, 1533 (11th Cir. 1985); *see also Valley Drug Co. v. Geneva Pharmaceuticals, Inc.*, 350 F.3d 1181, 1189 (11th Cir. 2003).

These criteria are clearly satisfied in this case. There is no conflict between Plaintiff Reilly or his counsel and putative class members. Plaintiff Reilly is represented by attorneys employed by the ACLU Foundation of Florida and the Florida Justice Institute ("FJI"), which have extensive experience in class action cases involving federal civil rights claims for prisoners. The attorneys have previously litigated constitutional and statutory issues for prisoners in federal courts and are familiar with the issues raised in this litigation. *See, e.g.*, Am. Order (R. Doc. 34), *Underwood v. Manfre*, No. 3:13-cv-192 MMH (M.D. Fla. Jan. 8, 2014) (certifying a class in a challenge of the Flagler Sheriff's postcard-only mail policy and appointing attorneys from the ACLU Foundation of Florida and FJI as

class counsel); *Hamilton v. Hall*, No. 3:10-cv-355 MCR, 2011 WL 2161139 (N.D. Fla. May 26, 2011) (same); *Lawson v. Wainwright*, 108 F.R.D. 450, 457 (S.D. Fla. 1986) ("In the instant case, this Court has no doubt that Plaintiff [prisoner class] is represented by competent, diligent counsel [from the FJI]. The Court file reflects that Plaintiff and his counsel will zealously pursue the interests of the class."). The attorneys have litigated numerous class actions and have the personnel and the resources to fully litigate this action.

Plaintiff Reilly has no interest antagonistic to or in conflict with the interests of the class members he seeks to represent. Plaintiff Reilly and the proposed class share a common goal: an end to the Sheriff's unconstitutional inmate mail policies. There is no likelihood of conflicts or antagonistic interests developing between the Plaintiff Reilly and the class he represents because Plaintiff Reilly does not seek compensatory damages; he only seeks nominal damages, and principally requests only injunctive and declaratory relief.

III. Class certification is appropriate pursuant to Fed. R. Civ. P. 23(b)(2).

Certification is appropriate pursuant to Rule 23(b)(2) when the party opposing the class has acted or refused to act on grounds that apply generally to the class, so that final injunctive relief or corresponding declaratory relief is appropriate respecting the class as a whole. Fed. R. Civ. P. 23(b)(2). "The writers

of Rule 23 intended that subsection (b)(2) foster institutional reform by facilitating suits that challenge widespread rights violations of people who are individually unable to vindicate their own rights." *Baby Neal*, 43 F.3d at 64. Class certification under Rule 23(b)(2) is particularly appropriate in the prison litigation context where injunctive and declaratory relief are sought. *See, e.g., Pugh v. Locke,* 406 F.Supp. 318 (M.D. Ala. 1976), *aff'd sub nom. Newman v. Alabama,* 559 F.2d 283 (5th Cir. 1977), *cert. denied,* 438 U.S. 915 (1978); *Lawson,* 108 F.R.D. 458.

In certifying a class pursuant to Rule 23(b)(2), two basic requirements must be met: (1) the class members must have been harmed in essentially the same way by the defendant's acts; and (2) the common injury may properly be addressed by class-wide injunctive or equitable remedies. *Holmes v. Continental Can Co.*, 706 F.2d 1144, 1155 (11th Cir. 1983) ("[T]he claims contemplated in a [Rule 23] (b)(2) action are *class* claims, claims resting on the same grounds and applying more or less equally to all members of the class.") (emphasis in original). Where these two requirements are met, the class members' interests are sufficiently cohesive that absent members will be adequately represented. *Id.* at 1155 n. 8 ("[T]he (b)(2) class is distinguished from the (b)(3) class by class cohesiveness .... Injuries remedied through (b)(2) actions are really group, as opposed to individual injuries."); *Lemon v. International Union of Operating Engineers, Local No. 139, AFL-CIO,* 216 F.3d 577, 580 (7th Cir. 2000) ("Rule 23(b)(2) operates under the

presumption that the interests of the class members are cohesive and homogeneous such that the case will not depend on the adjudication of facts particular to any subset of the class nor require a remedy that differentiates materially among class members."). "The members of a [Rule 23](b)(2) class are generally bound together through 'pre-existing or continuing legal relationships' or by some significant common trait such as race or gender' that transcends the specific set of facts giving rise to the litigation." *Holmes*, 706 F.2d, 1155 n. 8.

Here, a challenge to the Sheriff's unconstitutional inmate mail policies, which uniformly would harm a specific class of people (correspondents of Jail inmates), falls squarely within the ambit of Rule 23(b)(2). The injuries would apply uniformly to the entire class.[4] Plaintiff Reilly requested a remedy that both will provide relief to the entire class and satisfies the strictures of Rule 65(d). *See* Compl., Relief Requested (asking the Court to enjoin the Sheriff's Postcard-Only Mail Policy). As putative class members are all correspondents of Jail inmates, they are bound by a common trait that predominates in the litigation. Accordingly, the requirements of Rule 23(b)(2) are easily met.

[4] Of course, it is not required that all class members have actually been denied the ability to send or receive a specific piece of correspondence. Certification is appropriate even if the defendant's action or inaction "has taken effect or is threatened only as to one or a few members of the class, provided it is based on *grounds* which have general application to the class." Fed. R. Civ. P. 23(b)(2), 1966 Amendment advisory committee note (emphasis added).

IV. The Court should appoint the undersigned as class counsel.

Fed. R. Civ. P. 23(g)(1) provides that "unless a statute provides otherwise, a court that certifies a class must appoint class counsel." Fed. R. Civ. P. 23(g)(1)(A) outlines the factors relevant to the appointment of class counsel:

> (i) the work counsel has done in identifying or investigating potential claims in the action;
>
> (ii) counsel's experience in handling class actions, other complex litigation, and the types of claims asserted in the action;
>
> (iii) counsel's knowledge of the applicable law; and
>
> (iv) the resources that counsel will commit to representing the class.

All of these factors militate in favor of appointing the undersigned as class counsel. As already noted, the undersigned counsel are attorneys employed by the ACLU Foundation of Florida and the Florida Justice Institute who have extensive experience in class action cases for prisoners involving federal civil rights claims. They are thoroughly familiar with the applicable law and have extensive experience in handling class actions, federal civil rights claims, and prisoners' rights litigation. They successfully represented a class of inmates at the Santa Rosa County, Florida, jail in their challenge of a similar postcard-only inmate mail policy, *see Hamilton*, No. 3:10-cv-355, as well as another class of persons writing to inmates at the Flagler County, Florida, jail, in a similar case, see *Underwood*, No. 3:13-cv-192. Both matters eventually settled with the court entering a consent

decree in each case. In addition, the undersigned have already done substantial work investigating and identifying the claims of the plaintiff class. They have sufficient resources that they will commit to representing the class.

WHEREFORE, Plaintiffs request that the Court certify a class of correspondents of Jail inmates, and appoint the Plaintiff's counsel as the class counsel and Reilly as class representative.

N.D. FLA. LOC. R. 7.1(B) CONFERENCE COMPLIANCE

Plaintiff's counsel conferred opposing counsel in a good faith effort to resolve by agreement the issues raised in this motion. The Sherriff opposes the relief requested in this motion.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I electronically filed today the foregoing with the Clerk of the Court using the CM/ECF system, which will send notification of such filing to all persons registered for this case, including any opposing counsel that have appeared.

Dated: November 24, 2014

Respectfully Submitted,

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