JULES LOBEL (*pro hac vice*)
Email: jll3@pitt.edu
ALEXIS AGATHOCLEOUS (*pro hac vice*)
Email: aagathocleous@ccrjustice.org
RACHEL MEEROPOL (*pro hac vice*)
Email: rachelm@ccrjustice.org
CENTER FOR CONSTITUTIONAL RIGHTS
666 Broadway, 7th Floor
New York, NY 10012
Tel: (212) 614-6478
Fax: (212) 614- 6499

Attorneys for Plaintiffs
(Additional counsel listed on signature page)

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

OAKLAND DIVISION

TODD ASHKER, DANNY TROXELL, GEORGE RUIZ, JEFFREY FRANKLIN, GEORGE FRANCO, GABRIEL REYES, RICHARD JOHNSON, PAUL REDD, LUIS ESQUIVEL, and RONNIE DEWBERRY, on their own behalf, and on behalf of a class of similarly situated prisoners,

Plaintiffs,

v.

EDMUND G. BROWN, JR., et al.,

Defendants.

Case No. 4:09 CV 05796 CW

CLASS ACTION

REPLY MEMORANDUM IN SUPPORT OF PLAINTIFFS' MOTION FOR CLASS CERTIFICATION

Date: August 22, 2013
Time: 2:00 p.m.
Judge: Honorable Claudia Wilken

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

Cases

Statutes

Other Authorities

I. INTRODUCTION

Defendants purport to oppose class certification on commonality, typicality, and adequacy grounds. But rather than relying on precedent or analysis, Defendants repeat arguments they have already made and lost, invite this Court to prematurely adjudicate the merits of Plaintiffs' claims, and deploy rhetoric designed to distract from the legal questions at hand. Indeed, Defendants' brief is striking in its lack of any meaningful analysis of the legal standards governing Rule 23, and its failure to distinguish (or, indeed, even mention) a *single* class certification decision on which Plaintiffs have relied. *See* Opposition to Motion for Class Certification ("Opp.").

Defendants begin by warning this Court that the Pelican Bay SHU ("PB-SHU") has a legitimate penological purpose, and that gang activity in prison justifies their policies and practices.[1] Plaintiffs, however, do not contend that prison gang activity "warrant[s] no special attention from prison officials," nor do they argue that the SHU cannot be deployed to "manage and control" that activity. *Id.* at 3, 4. But, as the Supreme Court has observed:

> Loading a detainee with chains and shackles and throwing him in a dungeon may . . . preserve the security of the institution. But it would be difficult to conceive of a situation where conditions so harsh, employed to achieve objectives that could be accomplished in so many alternative and less harsh methods, would not support a conclusion that the purpose for which they were imposed was to punish.

Bell v. Wolfish, 441 U.S. 520, 539 n.20 (1979). Likewise, even if the practices and procedures in place at the PB-SHU actually prevent gang violence, this does not make them constitutional. As *Bell* explains, simply invoking prison security does not answer Plaintiffs' challenge. More importantly, these are merits arguments that do not defeat class certification. The relevant question is whether the class is uniformly subjected to the policies and practices challenged in this lawsuit.

[1] Defendants submit two prisoner declarations to this effect. The admissibility of these declarations is currently at issue in a discovery motion before the Court, to which Plaintiffs will file opposition papers on August 9, 2013. Because the Court has not had an opportunity to rule on that motion, Plaintiffs address the contents of these declarations here. Notably, both prisoners, who are in the debriefing program and "awaiting final approval of [their] debrief package[s]," *see* Zubiate Decl. Dkt. No. 248 at ¶ 37, Elrod Decl. Dkt. No. 249 at ¶ 51, engaged in violent gang activity before being sent to the SHU: Zubiate slashed the neck of the member of a rival gang, Dkt. No. 248 at ¶ 5, and Elrod stabbed another inmate from a rival gang, Dkt. No. 249 at ¶ 5. By contrast, many prisoners at the SHU have not engaged in any gang-related misconduct or rule violations, and are placed and retained at the SHU based merely on allegations that they are *associated* with a gang. *See*, *e.g.*, Motion for Class Certification ("MCC"), Exh. C at ¶ 6.

Defendants go on to paint a rosy picture of life at the PB-SHU. They insist, for example, that prisoners "regularly stop[] by the cell fronts of other inmates in the pod to talk [before showering]," Opp. at 7, but decline to mention that, according to PB-SHU Operational Procedures, "[i]nmates are expected to go directly to the shower and not loiter or pass items to other inmates . . . [or] will forfeit their shower period." *See* Swift Decl. Exh. A, Dkt. No. 245-1 at 17. They leave unaddressed the conditions described in Plaintiffs' and experts' declarations, or Amnesty International's conclusion that the "severe environmental deprivation" at the PB-SHU "breach[es] international standards on humane treatment." MCC, Exh. V at 3. Moreover, as with their security argument, Defendants' assertions, even if true, do not defeat class certification. Defendants will later have an opportunity to argue that the conditions at the PB-SHU are constitutional. But for present purposes, Defendants appear to concede a subclass by acknowledging that all SHU prisoners are all subject to the same conditions – and, in declining to challenge Plaintiffs' showings regarding numerosity, that hundreds of prisoners have been warehoused there for decades.

II. ARGUMENT

Defendants advance three arguments to oppose certification of the Due Process class: first, that the class definition is imprecise because it includes individuals validated before *and* after the 2010 amendment to California's Penal Code regarding good time credits; second, that the class has received administrative process, and nothing else is due; and third, that the staggered implementation of the pilot program defeats commonality. As Plaintiffs show below, each argument is unavailing. *See infra*, Section A. With respect to the Eighth Amendment subclass, Defendants again resort to a merits argument, erroneously and irrelevantly arguing that Plaintiffs have not adequately alleged conditions amounting to a serious deprivation. Defendants also offer two self-serving declarations by PB-SHU prisoners, describing their former conditions as "austere" but not "crushing." As shown below in Section B, that some members of the class experience different harm, or even believe they are suffering no harm at all, does not defeat class certification. Finally, Defendants take aim at several members of the legal team, arguing that receipt of mail from a putative class member disqualifies an attorney from appointment as class counsel. Plaintiffs address this novel and unsupported claim in Section C.

A. PLAINTIFFS HAVE SHOWN COMMONALITY AND TYPICALITY WITHIN THE DUE PROCESS CLASS.

Defendants' first argument is easily disposed of. In their opposition to Defendants' Motion to Dismiss, Plaintiffs argued that the 2010 amendments to California's Penal Code, which strip SHU prisoners of their ability to earn good-time credits, *see* CAL. PENAL CODE §§ 2933, 2933.05, 2933.6(a), combined with the extraordinary length of time they have been confined at the PB-SHU and viewed in light of the harsh conditions there, have rendered SHU assignment a punitive rather than administrative measure. Hence, SHU prisoners are constitutionally entitled to *Wolff* hearings. *Wolff v. McDonnell*, 418 U.S. 539, 563, 566 (1974); *see also Wilkinson v. Austin*, 545 U.S. 209, 228 (2005) (revocation of good time credits calls for "more formal, adversary-type procedures"). Defendants do not (and cannot) dispute that all members of the proposed due process class (the "class") have been deprived of *Wolff* hearings. Instead, they argue that the class is "imprecise" because some prisoners were validated and reviewed before the effective date of these legislative amendments. Opp. at 16. But Plaintiffs claim that the amendments rendered indeterminate SHU sentences punitive across the board, so *all* members of the class became entitled to a *Wolff* hearing as of amendments' effective date. *All* members of the class have thus been denied due process. And *all* class members are entitled to a remedy. The timing of an individual prisoner's last validation or review does not disrupt the integrity of the class.

Defendants do not dispute Plaintiffs' submissions demonstrating that, along with being deprived of *Wolff* hearings, Plaintiffs and the class have also been denied timely periodic review of their confinement, and provided with misleading notice as to how to earn their way out of the SHU – and thus that common questions exist. *See* MCC, Exh. C at ¶¶ 8-9; Exh. E at ¶ 4; Exh. G at ¶ 2; Exh. I at ¶¶ 5-6; Exh. K at ¶¶ 5-6; Exh. M at ¶¶ 3, 5-8; Exh. O at ¶¶ 10-11; Exh. Q at ¶ 5; *see also* Exhs. D, F, H, J, L, N, P, R. Instead, Defendants argue that, because gang validation procedures are administrative decisions for which due process requirements are minimal, the proposed class "captures validated SHU inmates whose due process rights were not violated." Opp. at 16. This simply repeats their argument that Plaintiffs have not adequately pled a due process violation. *See* Motion to Dismiss at 13-14. This Court has already rejected this argument: "Because Plaintiffs here

allege that they received only minimal procedural safeguards while being subjected to a significant deprivation of liberty, they have stated a valid due process claim." *See* Order Denying Motion to Dismiss ("Order") at 12-13. The allegedly defective procedures apply to the entire class, CAL. CODE REGS. tit. 15, §§ 3341.5(c)(2)(A)(2), 3378(e), and so Plaintiffs and class members raise the same questions about their constitutionality. Defendants offer no rationale for why their already-rejected argument should fare better here.

Rehashing yet another argument made in their motion to dismiss, Defendants next insist that their pilot program counsels against the certification of the class. Under the pilot program, they say, CDCR "is conducting case-by-case reviews" of all SHU prisoners, and so ascertaining membership in the class would require "individual determinations of the level of review any particular inmate received at different points in time." Opp. at 16-17. Further, they assert, commonality and typicality are lacking because Plaintiffs' due process claim is "based on a policy that is no longer applicable to all members" of the class. *Id*. at 17, 22. But just as the pilot program did not support a finding of mootness, it does not defeat commonality and typicality.

First, and most fundamentally, every member of the class, along with every Plaintiff, was assigned to the PB-SHU, and received subsequent reviews pursuant to the policies and procedures challenged in this litigation. It is undisputed that Plaintiffs and class members would not find themselves at the PB-SHU but for these policies and procedures. Should Plaintiffs prevail on their due process claims, then *all* members of the class will be entitled to a remedy that cures that constitutional violation. Whether or not that remedy coincides with the procedures provided under the pilot program is another question for another day – namely, at the remedy phase of this case. The fact that all members of the class are in the SHU pursuant to a common policy and practice plainly satisfies Rule 23's commonality and typicality requirements. *See Armstrong v. Davis*, 265 F.3d 849, 868 (9th Cir. 2001) ("commonality is satisfied where the lawsuit challenges a system-wide practice or policy that affects all of the putative class members"; typicality exists "when each class members' claim arises from the same course of events, and each class member makes similar legal argument to prove the defendant's liability").

Moreover, as this Court has already found, Defendants' pilot program is not now permanent.[2] Defendants promise that the pilot program "is not an experiment," and will at some future point constitute their policy and practice. Opp. at 2. Consistently using the future tense, Defendants say, for example, that the pilot program "*will* serve to enhance the *existing* intelligence-based validation system," Hubbard Decl., Dkt. No. 246 at ¶ 7b (emphasis added); will involve "implementation" of a classification committee which "*will* be responsible locally for affirming initial security threat group validations," *id*. at ¶ 7e (same); and will involve the implementation of a step down program "to *replace* the *existing* six-year inactive review process," *id*. at ¶ 7g (same). As such, the most Defendants can say is that the program "is *expected* to" achieve reforms such as a step-down program. *Id*. at ¶ 6 (same). This is not a showing of permanence. At best, it amounts to a concession that all members of the class will be subject to *another* "system-wide practice or policy that affects all of the putative class members." *Armstrong*, 265 F.3d at 868. How this undermines commonality and typicality is unexplained.

And, as Plaintiffs already demonstrated in their opposition to Defendants' motion to dismiss, even if the pilot program is permanently implemented, it does not resolve their claims. It is undisputed, for example, that the pilot program does not provide the *Wolff* hearings that Plaintiffs contend are required by law. And it is irrelevant for class certification purposes whether this denial occurred pursuant to title 15 or the pilot program. As the Ninth Circuit has explained, "[t]he existence of shared legal issues with divergent factual predicates is sufficient [to meet the commonality requirement], as is a common core of salient facts coupled with disparate legal remedies within the class." *Hanlon v. Chrysler Corp*., 150 F.3d 1011, 1019 (9th Cir. 1998).

This common question of law alone is sufficient to satisfy the commonality requirement. *See Wal-Mart Stores, Inc. v. Dukes*, 131 S. Ct. 2541, 2256 (2011). But the due process questions that remain unresolved by the pilot program do not end with *Wolff*. As previously argued, under both

[2] As Defendants again acknowledge, the pilot program expires in October 2014. Dkt. No. 246 at ¶ 14. Thus, Defendants "have not shown that the STG program will *permanently* cure the specific due process violations that Plaintiffs allege," or that "any of the program's new procedures are permanent." Order at 6, 7. The same logic that defeated Defendants' claims of mootness defeat their assertion that commonality and typicality are now lacking. Every member of the class has been retained, and could continue to be retained, at the PB-SHU indefinitely under precisely the policies and practices that Plaintiffs challenge.

policies, "confirmed STG behavior or intelligence" used to validate gang affiliates and subject them to indefinite SHU confinement may merely involve possession of artwork or a photograph. *Compare* Hubbard Decl. Exh. A, Dkt. No. 246-1 at §§ 200.2, 600.1 *with* MCC, Exh. C at ¶¶ 8-9; Exh. E at ¶ 4; Exh. G at ¶ 2; Exh. I at ¶¶ 5-6; Exh. K at ¶¶ 5-6; Exh. M at ¶¶ 3, 5-8; Exh. O at ¶¶ 10-11; Exh. Q at ¶ 5; *see also* Exhs. D, F, H, J, L, N, P, R (plaintiffs denied inactive status despite lack of gang activity). And the pilot program still allows for gang validation in the absence of proven gang-related misconduct or a proper hearing. *See* Dkt. No. 246-1 at § 600.3; *see also* Dkt. No. 246 at ¶ 7c (describing a validation system "designed to correspond with the validation process under title 15"). These deficiencies go to the heart of Plaintiffs' contention that they are denied due process. All class members – in the pilot program or not – thus still pose a "common contention . . . capable of classwide resolution." *Wal-Mart*, 131 S. Ct. 2251.

Defendants' contention that the existence of the pilot program will necessitate individual determinations of the level of review any particular inmate received at a later time is also unavailing. Defendants once again decline to disclose how many prisoners at the PB-SHU have been included in the pilot program, *see* Dkt. No. 246 at ¶ 11, Order at 6, and thus lend no insight into the scope of this purported problem. It is, however, simply implausible that Defendants do not have ready access to the names of those class members who have been included in the pilot program. And even if this Court ultimately finds that those who have been through the pilot program have received all the process they are due, that would not defeat class certification. *See Walters v. Reno*, 145 F.3d 1032, 1046 (9th Cir. 1988) (holding that, even though some class members "may have received adequate notice in spite of [] constitutionally deficient official procedures," a common allegation of illegal procedures is sufficient to find commonality, even when subsequent complex individualized proceedings will be necessary to determine who received adequate process). At most, Defendants' argument amounts to an assertion that the number of class members entitled to relief may be somewhat smaller than is currently the case.

Just as Defendants could not make voluntary changes and use them to claim mootness, they cannot apply new procedures to a subset of the class and claim that this compromises commonality and typicality. Defendants make no showing that that the central due process questions – whether

Plaintiffs have been deprived of hearings to which they are entitled under *Wolff*, denied timely periodic review, and provided with misleading notice as to how to earn their way out of the SHU (questions which this Court has stated must be "considered as a whole," Opinion at 17) – no longer apply to all members of the class or have been resolved. The pilot program notwithstanding, Plaintiffs satisfy Rule 23's requirements with respect to the class.

B. PLAINTIFFS HAVE SHOWN COMMONALITY AND TYPICALITY WITHIN THE EIGHTH AMENDMENT SUBCLASS.

Defendants' argument that Plaintiffs' Eighth Amendment claim is not amenable to classwide resolution is similarly unconvincing. Defendants repeat their assertion that, in the submissions that accompany their motion, Plaintiffs have not adequately alleged conditions that amount to a serious deprivation under the Eighth Amendment. Opp. at 19. Defendants misunderstand Plaintiffs' burden at this stage. This Court has already found that Plaintiffs have plausibly alleged an Eighth Amendment violation, Order at 9, and this is not occasion to revisit that ruling. What is now at issue is whether Plaintiffs have demonstrated that they pose common questions of law or fact regarding their Eighth Amendment claim, and whether their claims – already deemed plausible – are typical of the class. Fed. R. Civ. P. 23(a)(2)-(3). This they have done through, *inter alia*, the declarations of Professor Craig Haney, a leading psychologist expert with extensive experience at the Pelican Bay SHU, and Dr. Terry Kupers, a nationally-renowned psychiatrist who has interviewed each named plaintiff. *See* MCC at 12-18, Exhs. T, U.

Defendants do not dispute that all members of the Eighth Amendment subclass (the "subclass") are subject to the same conditions or have been confined subject to the same policy of indeterminate SHU confinement. *See* CAL. CODE REGS. tit. 15, § 3341.5(c)(2)(A)(2). Instead, they submit declarations from two prisoners who believe that they have experienced no harm as a result of their SHU confinement. This, Defendants claim, is "exemplary of the dissimilarity inherent" across the proposed subclass. Opp. at 20.

Both Haney and Kupers have repeatedly visited the Pelican Bay SHU and interviewed numerous prisoners there about the negative psychological effects and grave risks of psychological harm that result from solitary confinement. *See* MCC Exhs. T at ¶¶ 1-7, 10, 11, U at ¶¶ 2-9. Mental

health self-reporting by two prisoners who have provided Defendants with declarations in the course of debriefing, *see* Zubiate Decl., Dkt. No. 248 at ¶ 37, Elrod Decl., Dkt. No. 249 at ¶ 51 (both are "awaiting final approval of [their] debrief package[s]"), simply do not rebut the opinions of a board-certified psychiatrist with extensive experience in correctional settings, and a psychologist with four decades of expertise in the psychological effects of imprisonment and solitary confinement. In fact, the Elrod declaration suggests that what he describes as the "austere" conditions at the SHU, Dkt. No. 249 at ¶ 14, *have* harmed PB-SHU prisoners. *See id*. at ¶ 25, 26 ("for many years I suffered tough times"; "I have seen younger inmates experience repetitive anxious thoughts").[3]

Defendants do not bother to support their arguments about the significance of these prisoner declarations with case law, stating, for example, that "dissimilarities among inmates as to the effect of segregated housing in the SHU are sufficient to defeat class certification," Opp. at 19, without any citation whatsoever. This assertion is incorrect. The Elrod and Zubiate declarations simply do not refute the many class certification decisions cited by Plaintiffs, holding that differences in harm do not defeat class certification. In *Parsons v. Ryan*, for example, the court certified a class of all prisoners subjected to the medical, mental health, and dental care policies and practices of the Arizona Department of Corrections over near-identical objections to those made here, noting: "It matters not that each inmate may suffer from different ailments or require individualized treatment because commonality may be met where 'the claims of every class member are based on a common legal theory, even though the factual circumstances differ for each member.'" No. CV12-0601-PHX-NVW, 2013 U.S. Dist. LEXIS 46295, at *24 (D. Az. Mar. 5, 2013) (citing *Hanlon*, 150 F.3d at 1011, 1019); *see also Baby Neal v. Casey*, 43 F.3d 48, 58 (3d Cir. 1995) ("[C]lass members can assert such a single common complaint even if they have not all suffered actual injury; demonstrating that all class members are *subject* to the same harm will suffice") (emphasis added). The same analysis applies here. Rule 23 "does not require the named plaintiffs to be identically situated with all other class members," only that their situations be "sufficiently parallel to insure a vigorous and full

[3] Notably, Elrod felt sufficiently troubled by his SHU placement to challenge it in federal court as recently as 2011. *See Elrod v. Harlow*, No. C 09-04584 JF (PR), 2011 U.S. Dist. LEXIS 24755 (N.D. Cal. March 11, 2011).

representation of all claims." *Cal. Rural Legal Assistance, Inc. v. Legal Servs. Corp.*, 917 F.2d 1171, 1175 (9th Cir. 1990).

Moreover, even assuming that these declarations demonstrate that these two prisoners have not been harmed, they do not rebut Plaintiffs' allegations that they,[4] and members of the class, face a significant *risk* of harm because of their prolonged SHU confinement. *See* MCC Exhs. U at ¶¶ 10, 28-31, T at ¶¶ 12, 18, 38 (experts Haney and Kuppers explain that all members of the subclass are, *inter alia*, exposed to a significant risk of future debilitating and permanent psychological harm); *see also Brown v. Plata*, 131 S. Ct. 1910, 1926 n.3 (2011) (ordering classwide relief based on "systemwide deficiencies in the provision of medical and mental health care that, taken as a whole, subject sick and mentally ill prisoners in California to 'substantial *risk* of serious harm'") (emphasis added); *Helling v. McKinney*, 509 U.S. 25, 33 (1993) ("That the Eighth Amendment protects against future harm to inmates is not a novel proposition . . . . It would be odd to deny an injunction to inmates who plainly proved an unsafe, life-threatening condition in their prison on the ground that nothing yet had happened to them").

Defendants' citation to *Madrid v. Gomez*, 889 F. Supp. 1146, 1235 (N.D. Cal. 1995), for the proposition that SHU conditions "do not have a uniform effect on all inmates," makes no sense as an argument against class certification. *Madrid* was, after all, itself a class action. *Id.* at 1154. While the court ultimately found an Eighth Amendment violation for only some members of the class, it still *certified* the class in light of the fact that all prisoners were subject to the same conditions and were alleged to suffer harm as a result. *Id.* And as this Court has already found, the *Madrid* analysis is not controlling (and hence Plaintiffs have plausibly alleged an Eighth Amendment violation) because *Madrid* "expressly left open the possibility that longer periods of confinement in the SHU – such as those alleged here – could implicate Eighth Amendment concerns, even for those inmates who are not predisposed to mental illness." Order at 10.

[4] Although Elrod opines that Plaintiff Redd is "sane" and he "never saw" Plaintiff Johnson "exhibit behavior that indicated he was mentally suffering," Defendants also submit a declaration indicating that he would have little basis to know as prisoners avoid making their mental health issues known. *See* Ruggles Decl., Dkt. No. 247 at ¶ 14. Plaintiffs, meanwhile, have submitted a declaration by Dr. Kupers, a board-certified psychiatrist, finding a range of mental health problems in all Plaintiffs and finding no evidence of malingering among the named Plaintiffs. *See* MCC at Exh. U at ¶¶ 11-27, 32. A layman's observations hardly rebut this evidence.

Plaintiffs have submitted unrefuted evidence that members of the subclass have all been subjected to the same crushing conditions for at least a decade pursuant to Defendants' policy of retaining prisoners validated as gang associates in the SHU for indeterminate periods of time. *See* MCC, Exh. A at ¶¶ 2-17; Exh. V at 12; *Madrid*, 889 F. Supp. at 1227-30; CAL. CODE REGS. tit. 15, § 3341.5(c)(2)(A)(2). Plaintiffs' expert declarations also demonstrate "the harmful effects of long-term isolation and the serious risk of such harm that this form of confinement poses for *all* prisoners who are subjected to it." MCC, Exh. T at ¶ 38 (emphasis added); *see also* Exh. U at ¶¶ 10, 28-31. This common exposure to conditions, policies, and harm warrants class certification.

Defendants prematurely and unsuccessfully attempt to poke holes in the evidence Plaintiffs have submitted. Based on Professor Haney's examination of seven PB-SHU prisoners in 1993 and then 2013, Defendants argue that "the length of segregated confinement did not *appear* to negatively impact the inmates' functioning or reported symptomatology." Opp. at 21 (emphasis added). This observation ignores Haney's and Dr. Kupers's explicit findings that prolonged SHU confinement exacerbates the mental health consequences of isolation, as well as Haney's findings that these seven prisoners have, over the past two decades, "*lost* a connection to the basic sense of who they 'were.'" *See* MCC Exhs. T at ¶¶ 44-45, U at ¶¶ 16-17 (emphasis added).

Moreover, Defendants' disputation of Plaintiffs' expert declarations speaks to the merits, not class certification. Defendants repeatedly quarrel with the substance of Haney's declaration. While conceding that SHU confinement "presents some risk to inmates' mental health," they assert that "not all inmates are impacted negatively, nor does the length of confinement in segregation increase that risk." Opp. at 21.

Defendants misunderstand the requisite analysis at this stage. Plaintiffs need not prove their claims here; they simply need to submit evidence that they have posed questions capable of classwide resolution. The Supreme Court reiterated in *Wal-Mart* that class claims must "depend upon a common *contention* . . . [that is] capable of classwide resolution – which means that *determination of its truth or falsity will resolve an issue* that is central to the validity of each one of the claims in one stroke." 131 S.Ct. at 2551 (emphasis added). In other words, "[w]hat matters to class certification . . . [is] the capacity of a classwide proceeding to generate common *answers* apt to

drive the resolution of the litigation." *Id*. (same). The Supreme Court has since emphasized that "Rule 23 grants courts no license to engage in free-ranging merits inquiries at the certification stage." *Amgen Inc. v. Conn. Ret. Plans and Trust Funds*, 133 S. Ct. 1184, 1194-95 (2013); *see also Parsons*, 2013 U.S. Dist. LEXIS 46295, at *9 (granting class certification in case challenging conditions of confinement in Arizona isolation units and noting that "the prohibition on requiring Plaintiffs to establish their claims at the class certification stage was recently reinforced by the Supreme Court in *Amgen*"). "The district court is required to examine the merits of the underlying claim in this context, only inasmuch as it must determine whether common questions exist; not to determine whether class members could actually prevail on the merits of their claims . . . . To hold otherwise would turn class certification into a mini-trial." *Ellis v. Costco Wholesale Corp.*, 657 F.3d 970, 983 n.8 (9th Cir. 2011); *see also Dukes v. Wal-Mart Stores*, Inc., 603 F.3d 571, 592 (9th Cir. 2010) (en banc), *rev'd Wal-Mart*, 131 S. Ct. 2541 ("disagreement [about the credibility of competing evidence] is relevant only to the merits of plaintiffs' claim . . . and not to whether plaintiffs have asserted common questions of fact or law'"); *Wal-Mart*, 131 S. Ct. at 2552 n.6 (clarifying that Rule 23 does not authorize a preliminary inquiry into the merits for purposes other than determining whether certification is proper).

In essence, "Defendants demand evidence of the harm that has befallen each member comprising this putative class, but actual injury to absent class members need not be proven at this stage." *Connor B. ex rel. Vigurs v. Patrick*, 272 F.R.D. 288, 296 (D. Mass 2011). As the *Connor B.* court explained:

> [Where] Plaintiffs have detailed specific policies and/or failures within [the foster care system] that have resulted in specific harms to each named Plaintiff and that pose a continuing threat to the entire Plaintiff class . . . [they] need not prove how each policy or failure has harmed each member of the class at this stage. In other words, the unreasonable *risk* of harm created by these alleged systemic failures . . . and applicable to the entire Plaintiff class is sufficient to satisfy the requirement of commonality.

Id. at 295. Here, Plaintiffs have submitted not just evidence of specific policies and conditions at the PB-SHU, but expert evidence that these policies and conditions have harmed them, and have either harmed, or pose a significant risk of harm, to the subclass. This satisfies Rule 23.

Even if this Court were to probe further, the Morgan declaration that Defendants have submitted in an attempt to demonstrate that not all prisoners are harmed by prolonged solitary confinement either corroborates Plaintiffs' allegations, or misses the point. Morgan asserts that "[t]here is increasing data to *suggest* that administrative segregation is not harmful to *all* inmates and *may* not even be damaging from a long-term mental health perspective to *most* inmates." Morgan Decl., Dkt. No. 243 at ¶ 18 (emphasis added). This equivocal statement implicitly acknowledges that the current consensus is that segregation *is* in fact harmful to all prisoners – as Professor Haney has made clear. MCC Exh. T at ¶ 38. And in fact, Morgan acknowledges that, based on his clinical experience, "*it is a truism that long-term placement in segregated housing does have adverse effects on inmates* . . . . Specifically, I observed the effects on inmates' ability to remain hopeful, signs of chronic stress resulting from lack of stimulation and segregation from other inmates, and social impairment." *Id*. at ¶ 19 (emphasis added). This only corroborates Plaintiffs' assertion that there is consistent and predictable harm across the subclass. Morgan's disclaimer that "these effects would not constitute serious mental illness," *id*., rebuts nothing, as Plaintiffs have not alleged that they or the subclass are suffering from serious mental illness. They have proffered evidence that they and the subclass are suffering significant mental and/or physical harm, or have been exposed to an unreasonable and significant risk of permanent psychological harm. *See* MCC at 12, 1; Exhs. T at ¶¶ 12, 18, 38, U at ¶¶ 10, 28-31. This Court has already found that Plaintiffs' allegations of "serious psychological pain and suffering and permanent psychological and physical injury" are sufficient to plead an Eighth Amendment violation. Opinion at 9. Morgan's opinions about an absence of serious mental illness are thus irrelevant.

At best, the Morgan declaration establishes that a psychologist who has never visited the PB-SHU and has thus never interviewed prisoners there, Dkt. No. 243 at ¶ 10, believes that solitary confinement "*may* not even be damaging from a long-term mental health perspective," *id*. at ¶ 18 (emphasis added), based on his experience with prisoners who had been in isolation for significantly shorter periods of time than the subclass, who had regular access to telephone calls and windows in their cells, and who have received more frequent mental health assessments than do members of the subclass. *Id*. at ¶¶ 13, 27, 25. He acknowledges, meanwhile, that "increased access to life outside

one's cell [at the PB-SHU] is likely to serve as a protective factor against inmates' deterioration in functioning, especially for those inmates at greatest risk for decompensation." *Id.* at ¶ 27. He admits that the "denial of telephone calls on a regular basis [at PB-SHU] . . . is a strict policy not found in most segregated housing units," *id.* at ¶ 23, and that "the absence of a window in prison cells [at the PB-SHU] does not appear to provide any additional security precautions and therefore appears, at face value, to be strict," *id.* at ¶ 27. And he agrees that the "results of the literature review suggests that psychological harm can occur as a result of long-term placement in segregation."[5] *Id.* at ¶ 12. It is entirely unclear how these statements disprove, rather than corroborate, Plaintiffs' allegations of typicality and commonality.

C. PLAINTIFFS' COUNSEL HAVE DEMONSTRATED THEIR ADEQUACY AS CLASS COUNSEL.

Finally, without citing to a single case, Defendants claim that three members of Plaintiffs' legal team have not demonstrated adequacy to serve as class counsel because their qualifications were presented in their co-counsel's declaration. Opp. at 23. Contrary to Defendants' characterization, the information in that declaration does not consist of co-counsel's "opinions," *id.*, but rather facts known to him. It is also perfectly orthodox to submit a single declaration regarding adequacy as class counsel. *See*, *e.g.*, *Parsons*, No. CV 12-00601-PHX-NVW, Dkt. No. 240 (D. Az., Nov. 9, 2012). Nonetheless, Plaintiffs here submit separate declarations explaining these attorneys' adequacy as class counsel to allay any concerns. *See* Exhs. A-C.

Defendants also advance an inflammatory claim that attorneys McMahon and Strickman are "fact witnesses" in this case because they are members of an ongoing mediation team between CDCR and Pelican Bay prisoners, and because one of them was sent a letter by a PB-SHU prisoner claiming that there was an "ulterior motive" to the 2011 hunger strikes. Opp. at 23-24. Defendants

[5] Morgan concedes that "this literature was well documented in Dr. Haney's declaration." *Id.* at ¶ 11. Haney, of course, explained that the scientific literature indicates that long-term exposure to conditions such as those at the PB-SHU "places prisoners at grave risk of psychological harm." MCC Exh. U at ¶ 14. Morgan's only quarrel with Haney's literature review is that it does not address one Colorado study, but as he acknowledges, that study had "research limitations" and is "not without criticism." Dkt. No. 243 at ¶¶ 14, 15; *see also* Stuart Grassian & Terry Kupers, *The Colorado Study vs. the Reality of Supermax Confinement*, 13 CORR. MENTAL HEALTH REP., May/June 2011 (cataloging methodological flaws in the Colorado study).

do not cite a single case that holds that an attorney cannot also act as an advocate. They refer suggestively to McMahon's and Strickman's "duty of candor to the Court," *id*. at 24, but do not explain if, how, or when that duty has been compromised. They offer no insight into how the motives underlying the 2011 hunger strike are in any way relevant to the claims in this case. Nor do they explain why the contents of a letter from a prisoner to McMahon is anything but hearsay. Defendants' effort to impugn counsels' integrity should not be countenanced.

D. THIS CASE IS UNCONTROVERTIBLY AMENABLE TO INJUNCTIVE RELIEF.

Defendants close their brief by raising concerns about the scope of the relief sought by Plaintiffs. Opp. at 25. The relief required to remedy the violations that Plaintiffs allege is not at issue here, and will be addressed at the remedy phase. Defendants can, of course, raise whatever objections they have to particular remedies that Plaintiffs seek at the appropriate time. Rule 23(b)(2) simply asks whether injunctive relief is "*appropriate* respecting the class as a whole." *Id*. (emphasis added). Plaintiffs have demonstrated the appropriateness of injunctive relief by citing to a long line of analogous cases seeking injunctive relief on behalf of prisoners that have proceeded as class actions in the Ninth Circuit. *See* MCC at 22 (collecting cases); *Plata*, 131 S. Ct. at 1910 (affirming class-wide injunctive relief to alleviate prison overcrowding and inadequate health care); *Walters v. Reno*, 145 F.3d 1032, 1047 (9th Cir. 1988) (Rule 23(b)(2) "was adopted in order to permit the prosecution of civil rights actions"); *Baby Neal*, 43 F.3d at 58 (Rule 23(b)(2) is "almost automatically satisfied in actions primarily seeking injunctive relief"). Defendants do not even attempt to distinguish any of these cases from the present lawsuit.

Moreover, this case can also be maintained as a class action under Rule 23(b)(1), as Plaintiffs have already explained. *See* Plfts.' Mot. for Leave to File 2nd Am. Compl., Dkt. No. 126 at 13. Numerous *pro se* cases have raised challenges to policies, practices, and conditions at the PB-SHU. *See*, *e.g.*, *Mariquez v. Tilton*, No. C 08-2427 MHP (pr), 2011 WL 1230022 (N.D. Cal. Mar. 30, 2011); *Pina v. Tilton*, No. C 07-4989 SI (pr), 2008 WL 4773564 (N.D. Cal. Oct. 28, 2008); *Jurado v. Gomez*, No. C 93-3992 FMS,1998 WL 209162 (N.D. Cal. Apr. 28, 1998); *Medina v. Gomez*, No. C 93-1774 THE, 1997 WL 488588 (N.D. Cal. Aug. 14, 1997). In the absence of class

action litigation, more are likely. Bringing in the relevant parties to secure complete relief and avoid a multiplicity of lawsuits serves the interests of judicial economy and the efficient disposition of the serious constitutional claims regarding the PB-SHU. *See* Rule 23(b)(1)(B); *see also Crown, Cork, & Seal Co., v. Parker*, 462 U.S. 345, 350-351 (1983) (stating that Rule 23 is designed to avoid a "needless multiplicity of actions"). Class action litigation will also serve to clarify any disagreement in the District about the scope of the due process rights of SHU prisoners. *See* Rule 23(b)(1)(A); *also compare Reyes v. Horel*, No. C 08-4561 RMW, 2012 U.S. Dist. LEXIS 30787 (N.D. Cal. Mar. 7, 2012) (inactive review process must comport with procedural due process) *with Elrod*, 2011 U.S. Dist. LEXIS 24755 (finding no state created liberty interest at the SHU which would require compliance with procedural due process). Thus, Rule 23(b)(1) is also satisfied.

III. CONCLUSION

For the foregoing reasons, and those in their initial Memorandum of Points of Authorities, Plaintiffs respectfully request that the Court grant their motion for class certification, and appoint undersigned counsel as class counsel.

Dated: August 8, 2013

Respectfully submitted,

By: /s/Alexis Agathocleous

ALEXIS AGATHOCLEOUS (*pro hac vice*)
Email: aagathocleous@ccrjustice.org
JULES LOBEL (*pro hac vice*)
Email: jll3@pitt.edu
RACHEL MEEROPOL (*pro hac vice*)
Email: rachelm@ccrjustice.org
CENTER FOR CONSTITUTIONAL RIGHTS
666 Broadway, 7th Floor
New York, NY 10012
Tel: (212) 614-6478
Fax: (212) 614-6499

GREGORY D. HULL (Bar No. 57367)
Email: greg.hull@weil.com
BAMBO OBARO (Bar No. 267683)
Email: bambo.obaro@weil.com
WEIL, GOTSHAL & MANGES LLP
201 Redwood Shores Parkway
Redwood Shores, CA 94065-1134
Tel: (650) 802-3000
Fax: (650) 802-3100

CHARLES F.A. CARBONE (SBN 206536)
Email: Charles@charlescarbone.com
EVAN CHARLES GREENBERG (SBN 271356)
Email: evan@charlescarbone.com
LAW OFFICES OF CHARLES CARBONE
P. O. Box 2809
San Francisco, CA 94126
Tel: (415) 981-9773
Fax: (415) 981-9774

MARILYN S. MCMAHON (SBN 270059)
Email: Marilyn@prisons.org
CALIFORNIA PRISON FOCUS
1904 Franklin Street, Suite 507
Oakland, CA 94612
Tel: (510) 734-3600
Fax: (510) 836-7222

ANNE BUTTERFIELD WEILLS (SBN 139845)
Email: aweills@aol.com
SIEGEL & YEE
499 14th Street, Suite 300
Oakland, CA 94612
Tel: (510) 839-1200
Fax: (510) 444-6698

CAROL STRICKMAN (SBN 78341)
Email: carol@prisonerswithchilodren.org
LEGAL SERVICES FOR PRISONERS WITH CHILDREN
1540 Market Street, Suite 490
San Francisco, CA 94102
Tel: (415) 255-7036
Fax: (415) 552-3150

PROOF OF SERVICE

Case Name: Ashker, et al. v. Brown, et al.

Case No.: 4:09-cv-05796-CW

I hereby certify that on August 8, 2013, I electronically filed the following documents with the Clerk of the Court by using the CM/ECF system:

PLAINTIFFS' REPLY MEMORANDUM IN SUPPORT OF MOTION FOR CLASS CERTIFICATION

I certify that **all** participants in the case are registered CM/ECF users and that service will be accomplished by the CM/ECF system.

I declare under penalty of perjury that the foregoing is true and correct. Executed on August 8, 2013 at New York, New York.

/s/Alexis Agathocleous_____
Alexis Agathocleous, Esq.