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UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF CALIFORNIA

MARTHA BERNDT, et al., )  
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Plaintiff(s), )  
)  
v. )  
)  
CALIFORNIA DEPARTMENT OF )  
CORRECTIONS, et al., )  
)  
)  
Defendant(s). )  
)  
)  
\_\_\_\_\_ )

No. C03-3174 VRW (BZ)  
  
**REPORT AND RECOMMENDATION  
REGARDING CLASS COUNSEL'S  
ADEQUACY**

On September 16, 2010, the Honorable Vaughn R. Walker's referral for a report and recommendation on the issue of whether plaintiffs' counsel are adequate to represent the interests of the class was randomly assigned to me.<sup>1</sup> Docket No. 360. As instructed, I scheduled a conference for September 28, 2010 to discuss the issue. At this conference, defendants explained that the thrust of their allegation was that plaintiffs' counsel's conduct in litigating the action

<sup>1</sup> Counsel for plaintiffs are Pamela Y. Price, Esq., John L. Burris, Esq., and Charles S. Ralston, Esq.

1 showed that they were inadequate. Docket No. 382 at 13.

2 After considerable discussion, I **ORDERED** defendants to select

3 the plaintiff they thought was most knowledgeable about this

4 issue, who would then testify at a hearing. Docket No. 365.

5 Defendants were put on notice that if they failed to make a

6 sufficient showing at this hearing, it might be unnecessary

7 for there to be any other proceedings.<sup>2</sup> Docket No. 382 at 38-

8 39; 51-52. Defendants chose plaintiff Marta Hastings, and she

9 testified at an evidentiary hearing on December 3, 2010.

10 Having considered her testimony, the arguments of counsel, and

11 the documents and exhibits submitted by the parties at the

12 hearing, the following are my proposed findings and

13 recommendations.

14 Judge Walker's referral specifically asked me to evaluate

15 class counsel's adequacy under FRCP 23(g)(1)(A). This rule

16 requires courts to consider the following four factors in

17 assessing class counsel: "(1) the work counsel has done in

18 identifying or investigating potential claims in the action;

19 (2) counsel's experience in handling class actions, other

20 complex litigation, and the types of claims asserted in the

21 action; (3) counsel's knowledge of the applicable law; and (4)

22 the resources that counsel will commit to representing the

23 class."

24 On the first factor, I find that plaintiffs' counsel have

25 adequately identified and investigated the potential claims.

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26 <sup>2</sup> This is consistent with Judge Walker's referral which  
27 contemplated that the magistrate judge would only conduct  
28 hearings and other proceedings "as necessary" to make the  
needed findings. Docket No. 360 at 4.

1 Hastings testified that plaintiffs' counsel have met with her  
2 numerous times to discuss her claims, and she has been in  
3 contact with counsel throughout the case.<sup>3</sup> Hastings receives  
4 regular updates, and she and the other plaintiffs have  
5 participated in multiple phone conferences with their counsel.  
6 While Hastings does not specifically remember the scope of her  
7 counsel's investigation and she cannot speak on the behalf of  
8 other named plaintiffs, defendants have not persuaded me that  
9 they have a legitimate concern. Moreover, before this lawsuit  
10 was filed, plaintiffs' counsel were already familiar about the  
11 types of claims in the case because they were the attorneys  
12 for plaintiff in Freitag v. California Department of  
13 Corrections, et al., C00-2278; 468 F.3d 528 (9th Cir. 2006).  
14 In Freitag, a female correctional officer prevailed on similar  
15 claims, represented by plaintiffs' counsel. Id. The  
16 combination of plaintiffs' counsel's background knowledge —  
17 gained from Freitag — about the claims, their work with the  
18 clients in this case, and counsel's statements on the record  
19 denying defendants' accusations, leaves me satisfied that  
20 plaintiffs' counsel meet the requirements of this first  
21 factor.<sup>4</sup>

22 I also find that plaintiffs' counsel meet the remaining  
23 requirements of FRCP 23(g)(1)(A). From counsel's multiple  
24 appearances before this Court and others, counsel have

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25 <sup>3</sup> Hastings testified that she did not remember many of  
26 the specific details about her representation by counsel due to  
27 the passage of time.

28 <sup>4</sup> In Freitag, Judge Henderson referred to me the issue  
of counsel's claimed supplemental fees and costs.

1 experience in handling class actions and other complex civil  
2 rights and employment litigation. Freitag again assures that  
3 plaintiffs' counsel have knowledge of the applicable law. And  
4 plaintiffs' counsel confirmed at the evidentiary hearing that  
5 they not only have the resources to try this class action, but  
6 are also willing to commit these resources to the case.

7 Defendants have not presented any evidence or argument to the  
8 contrary regarding these remaining factors. Accordingly, I  
9 find that under the FRCP 23(g)(1)(A) factors that courts must  
10 consider when appointing class counsel, plaintiffs' counsel  
11 are adequate.

12 Judge Walker also asked me to consider six specific  
13 questions regarding the adequacy of plaintiffs' counsel.<sup>5</sup>

14 Docket No. 360 at 4-5. Summarizing and grouping these  
15 questions together, I must decide the following:

16 (1) whether plaintiffs or plaintiffs' counsel initiated this  
17 lawsuit and decided to pursue it as a class action; (2) what  
18 steps the class representatives took to ensure plaintiffs'  
19 counsel investigated their claims and are capable of handling  
20 class actions; and (3) whether plaintiffs considered using  
21 other counsel. Id.

22 On the first question, defendants have stated that they  
23 are "not necessarily contending" that plaintiffs' counsel  
24 initiated this lawsuit. See Docket No. 382 at 13. And  
25 defendants have not presented any concrete evidence to support

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27 <sup>5</sup> Under FRCP 23(g)(1)(B), courts are permitted to  
28 evaluate any other factors that are pertinent to class  
counsel's ability to adequately represent the class.

1 any such claim. At the hearing, Hastings testified that she  
2 personally contacted Price after being informed about the  
3 lawsuit from a fellow female correctional officer who was also  
4 a plaintiff. Hastings also testified that she wants to  
5 prevent the inmates' offensive behavior — which she was  
6 forced to experience — from affecting other women. I  
7 construe this testimony to mean that Hastings desires the  
8 class of all female correctional officers to benefit from this  
9 lawsuit. Given this testimony, and defendants failing to  
10 produce persuasive evidence to the contrary, I find that  
11 plaintiffs have pursued this class action lawsuit on their own  
12 volition.<sup>6</sup>

13 Regarding the second and third question, Hastings  
14 testified that she never doubted the capabilities of her  
15 counsel in this class action because she believed in them and  
16 they had prevailed in Freitag. Due to her confidence in  
17 experienced counsel, she does not recall taking any specific  
18 steps to ensure that counsel were thoroughly investigating her  
19 claims or were capable of handling class actions. For the  
20 same reasons, Hastings never considered retaining other

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22 <sup>6</sup> Plaintiffs' counsel sent letters to various  
23 correctional officers' associations notifying them about the  
24 class action and asking for female officers that face similar  
25 problems to contact counsel. Even if I were to consider these  
26 letters to be solicitation letters rather than investigatory  
27 letters, California Rule of Professional Conduct 1.400 and  
28 Model Rule of Professional Conduct 7.3 do not prohibit  
attorneys from writing such letters because they are not  
communications made in person or by telephone. Moreover,  
attorneys are generally permitted in class actions "to  
communicate with potential class members for the purpose of  
investigating and preparing the action." See Vapnek, Tuft,  
Peck & Wiener, Rutter Group Prac. Guide: Cal. Prof. Resp. §  
2:333.10 (The Rutter Group 2009).

1 counsel.

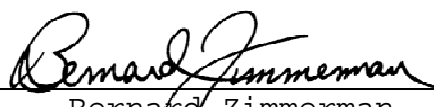
2       Based on the above findings, I conclude that defendants'  
3 claim that plaintiffs' counsel are not adequate to represent  
4 the interests of the class is unfounded. I also recommend not  
5 finding that class counsel is inadequate simply because the  
6 class representatives failed to consider other attorneys.  
7 Defendants have suggested no reason why a plaintiff would want  
8 anyone other than the lawyers who had prevailed in Freitag  
9 after many years of litigation.

10       After the evidentiary hearing, defendants objected that  
11 they did not have the opportunity to review some of the  
12 documents they subpoenaed because plaintiffs' counsel  
13 identified them as privileged. Docket No. 396. Defendants  
14 also requested that evidentiary hearings be held for each  
15 named plaintiff and that defendants be permitted to conduct  
16 discovery, including depositions, for each of these class  
17 representatives. Id. These objections and requests do not  
18 affect my findings or recommendations regarding the adequacy  
19 of class counsel. Defendants have not presented any arguments  
20 as to what the privileged documents may possibly reveal that  
21 will corroborate any of their moving allegations against  
22 plaintiffs' counsel's adequacy. I reviewed plaintiffs'  
23 privileged documents before the evidentiary hearing, and while  
24 I did not agree that all documents were privileged, none of  
25 them caused me concern about the adequacy of plaintiffs'  
26 counsel. Rather, the documents corroborated that plaintiffs'  
27 counsel are adequate. There is no need for additional  
28 discovery or further responses to subpoenas. I also do not

1 recommend taking testimony from other plaintiffs, inasmuch as  
2 defendants chose Hastings as their best witness on this issue.  
3 I expect that the testimony of other plaintiffs is likely to  
4 be substantially similar and will not change my findings or  
5 recommendations regarding class counsel's adequacy.

6 Finally, Judge Walker noted that defendants are concerned  
7 that plaintiffs' counsel "let the claims at issue languish for  
8 great lengths of time." Hastings shares this concern; however  
9 she repeatedly blamed defendants for the delay, citing a  
10 variety of procedural moves, such as seeking Judge Henderson's  
11 removal, which she believes are designed to avoid or delay a  
12 consideration of the merits of the class claims. Plaintiffs'  
13 counsel cited this proceeding as another such delay. I find  
14 that no evidence was presented to me that suggests that  
15 plaintiffs' counsel have delayed this case.

16 Dated: December 16, 2010

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Bernard Zimmerman  
United States Magistrate Judge

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