

1 IN THE UNITED STATES DISTRICT COURT
2 FOR THE NORTHERN DISTRICT OF CALIFORNIA

3
4 TODD ASHKER, et al.,

No. C 09-5796 CW

5 Plaintiffs,

ORDER GRANTING IN
PART MOTION FOR
CLASS

6 v.

CERTIFICATION;
DENYING MOTION TO
INTERVENE (Docket
Nos. 195, 233)

7 GOVERNOR OF THE STATE OF
CALIFORNIA, et al.,

8 Defendants.

9 _____/

10 Plaintiffs, a group of Pelican Bay State Prison inmates, move
11 for class certification to pursue claims under the Eighth and
12 Fourteenth Amendments of the United States Constitution.

13 Defendants, the Governor of the State of California, Secretary of
14 the California Department of Corrections and Rehabilitation
15 (CDCR), Chief of CDCR's Office of Correctional Safety, and Warden
16 of Pelican Bay State Prison, oppose the motion. After considering
17 the parties' submissions and oral argument, the Court grants the
18 motion in part and denies it in part. In addition, the Court
19 denies the California Correctional Peace Officers Association's
20 (CCPOA) motion to intervene.

21 BACKGROUND

22 Plaintiffs are ten inmates who live or recently lived in
23 solitary confinement at Pelican Bay, a maximum security prison
24 located in Crescent City, California. Five of these inmates are
25 currently assigned to the Security Housing Unit (SHU), the "most
26 controlled and restrictive housing available" at the prison, where
27 each has lived for over a decade. Swift Decl. ¶ 4. The other
28 five inmates were recently transferred out of the Pelican Bay SHU.

1 Although CDCR operates SHUs at three other correctional
2 facilities, this action focuses exclusively on the conditions of
3 confinement within the Pelican Bay SHU.

4 Under CDCR's current regulations, inmates may be assigned to
5 the SHU if their "conduct endangers the safety of others or the
6 security of the institution." Cal. Code Regs. tit. 15, § 3341.5;
7 accord Harrington Decl. ¶ 3. Any inmate who is a member or
8 associate of a gang is "deemed to be a severe threat to the safety
9 of others or the security of the institution and will be placed in
10 [the] SHU for an indeterminate term." Cal. Code Regs. tit. 15,
11 § 3341.5(c)(2)(A). Because all of the Plaintiffs in this case
12 were "validated" by CDCR as gang members or associates, they were
13 all assigned to the SHU for an indeterminate term.

14 Plaintiffs allege that SHU inmates live in almost total
15 isolation. They spend at least twenty-two and a half hours per
16 day in windowless, concrete cells with perforated steel doors and
17 typically leave only to shower or exercise alone in an enclosed
18 pen. Swift Decl. ¶ 8; Ashker Decl. ¶¶ 3, 9-11. Although SHU
19 inmates sometimes speak to each other through the perforations in
20 their cell doors, they cannot communicate face-to-face and have no
21 contact with inmates in Pelican Bay's general population. Ashker
22 Decl. ¶¶ 20-22; Zubiarte Decl. ¶ 28. They also have limited
23 contact with friends and family outside the prison. Ashker Decl.
24 ¶¶ 17-19; Dewberry Decl. ¶ 11; Esquivel Decl. ¶¶ 7-8; Franco Decl.
25 ¶¶ 7-8; Reyes Decl. ¶¶ 3-6; Ruiz Decl. ¶ 10; Troxell Decl. ¶ 5.

26 Plaintiffs filed this putative class action in September
27 2012, at which time all ten were assigned to the Pelican Bay SHU.
28 Their complaint alleges that long-term confinement inside the SHU

1 violates the Eighth Amendment's prohibition on cruel and unusual
2 punishment and that CDCR's procedures for assigning inmates to the
3 SHU violate the Fourteenth Amendment's guarantee of procedural due
4 process. Docket No. 136, Second Am. Compl. (2AC) ¶¶ 177-202.
5 Plaintiffs seek an injunction compelling CDCR to alleviate certain
6 conditions of confinement in the SHU, adopt new procedures for
7 reviewing SHU assignments, and transfer every inmate who has been
8 assigned to the SHU for more than ten years into the general
9 prison population. Id. at ¶ 202.

10 Defendants moved to dismiss the complaint in December 2012.
11 They argued, among other things, that Plaintiffs' due process
12 claim was moot because CDCR had implemented a new set of
13 procedures, collectively known as the "Security Threat Group"
14 (STG) pilot program, in October 2012 to review existing SHU
15 assignments and transfer certain SHU inmates into the general
16 population. The Court rejected that argument in its April 2013
17 order denying Defendants' motion to dismiss. It found that the
18 implementation of the STG pilot program was not sufficient to
19 render Plaintiffs' claims moot because CDCR had not implemented
20 the program permanently and, at that time, all ten Plaintiffs
21 remained subject to the preexisting procedures.

22 Defendants filed their answer to the complaint on April 30,
23 2013. Two days later, on May 2, 2013, Plaintiffs moved for class
24 certification under Federal Rules of Civil Procedure 23(b)(1) and
25 23(b)(2). In June 2013, CCPOA moved to intervene as a defendant.
26 It sought intervention under Rule 24(a) or, in the alternative,
27 under Rule 24(b).
28

1 Those motions remained pending for nearly a year while the
2 parties engaged in settlement negotiations. On May 14, 2014,
3 however, the parties notified the Court that they were not able to
4 reach a settlement. They filed a stipulation to lift the stay of
5 discovery that the Court had previously entered to allow them to
6 focus on settlement negotiations. The Court approved that
7 stipulation on May 16, 2014 and, at the parties' request, set a
8 case management conference for June 4, 2014.

9 LEGAL STANDARDS

10 I. Class Certification

11 Plaintiffs seeking to represent a class must satisfy the
12 threshold requirements of Rule 23(a) as well as the requirements
13 for certification under one of the subsections of Rule 23(b).
14 Rule 23(a) provides that a case is appropriate for certification
15 as a class action if

- 16 (1) the class is so numerous that joinder of
17 all members is impracticable;
- 18 (2) there are questions of law or fact common
to the class;
- 19 (3) the claims or defenses of the
20 representative parties are typical of the
21 claims or defenses of the class; and
- 22 (4) the representative parties will fairly
23 and adequately protect the interests of
the class.

24 Fed. R. Civ. P. 23(a).

25 Plaintiffs must also establish that one of the subsections of
26 Rule 23(b) is met. In the instant case, Plaintiffs seek
27 certification under subsections (b)(1) and (b)(2).
28

1 Subsection (b)(1) applies where the prosecution of separate
2 actions by individual members of the class would create the risk
3 of "inconsistent or varying adjudications with respect to
4 individual members of the class which would establish incompatible
5 standards of conduct for the party opposing the class," or of
6 adjudications "which would as a practical matter be dispositive of
7 the interests of the other members not parties to the
8 adjudications or substantially impair or impede their ability to
9 protect their interests." Fed. R. Civ. P. 23(b)(1).

10 Subsection (b)(2) applies where "the party opposing the class
11 has acted or refused to act on grounds generally applicable to the
12 class, thereby making appropriate final injunctive relief or
13 corresponding declaratory relief with respect to the class as a
14 whole." Fed. R. Civ. Proc. 23(b)(2). "Civil rights cases against
15 parties charged with unlawful, class-based discrimination are
16 prime examples" of Rule 23(b)(2) actions. Amchem Prods., Inc. v.
17 Windsor, 521 U.S. 591, 614 (1997).

18 Regardless of what type of class the plaintiff seeks to
19 certify, it must demonstrate that each element of Rule 23 is
20 satisfied; a district court may certify a class only if it
21 determines that the plaintiff has borne this burden. Gen. Tel.
22 Co. of Sw. v. Falcon, 457 U.S. 147, 158-61 (1982); Doninger v.
23 Pac. Nw. Bell, Inc., 564 F.2d 1304, 1308 (9th Cir. 1977). In
24 general, the court must take the substantive allegations of the
25 complaint as true. Blackie v. Barrack, 524 F.2d 891, 901 (9th
26 Cir. 1975). However, the court must conduct a "rigorous
27 analysis," which may require it "to probe behind the pleadings
28 before coming to rest on the certification question." Wal-Mart

1 Stores, Inc. v. Dukes, 131 S. Ct. 2541, 2551 (2011) (quoting
2 Falcon, 457 U.S. at 160-61). "Frequently that 'rigorous analysis'
3 will entail some overlap with the merits of the plaintiff's
4 underlying claim. That cannot be helped." Dukes, 131 S. Ct. at
5 2551. To satisfy itself that class certification is proper, the
6 court may consider material beyond the pleadings and require
7 supplemental evidentiary submissions by the parties. Blackie, 524
8 F.2d at 901 n.17. "When resolving such factual disputes in the
9 context of a motion for class certification, district courts must
10 consider 'the persuasiveness of the evidence presented.'" Aburto
11 v. Verizon Cal., Inc., 2012 WL 10381, at *2 (C.D. Cal.) (quoting
12 Ellis v. Costco Wholesale Corp., 657 F.3d 970, 982 (9th Cir.
13 2011)). Ultimately, it is in the district court's discretion
14 whether a class should be certified. Molski v. Gleich, 318 F.3d
15 937, 946 (9th Cir. 2003); Burkhalter Travel Agency v. MacFarms
16 Int'l, Inc., 141 F.R.D. 144, 152 (N.D. Cal. 1991).

17 II. Intervention

18 To intervene as a matter of right under Rule 24(a)(2), an
19 applicant must claim an interest the protection of which may, as a
20 practical matter, be impaired or impeded if the lawsuit proceeds
21 without the applicant. Wilderness Society v. U.S. Forest Serv.,
22 630 F.3d 1173, 1177 (9th Cir. 2011). The Ninth Circuit applies a
23 four-part test to motions under Rule 24(a)(2):

- 24 (1) the motion must be timely; (2) the
25 applicant must claim a "significantly
26 protectable" interest relating to the property
27 or transaction which is the subject of the
28 action; (3) the applicant must be so situated
that the disposition of the action may as a
practical matter impair or impede its ability
to protect that interest; and (4) the

1 applicant's interest must be inadequately
protected by the parties to the action.

2 Id. (quoting Sierra Club v. EPA, 995 F.2d 1478, 1481 (9th Cir.
3 1993)).

4 The Ninth Circuit interprets Rule 24(a)(2) broadly in favor
5 of intervention. Id. at 1179. In evaluating a motion to
6 intervene under Rule 24(a)(2), a district court is required "to
7 take all well-pleaded, nonconclusory allegations in the motion
8 . . . as true absent sham, frivolity or other objections." Sw.
9 Ctr. for Biological Diversity v. Berg, 268 F.3d 810, 820 (9th Cir.
10 2001).

11 Alternatively, a court may, in its discretion, permit
12 intervention under Rule 24(b)(1)(B) by anyone who "has a claim or
13 defense that shares with the main action a common question of law
14 or fact." In exercising its discretion, a court should "consider
15 whether the intervention will unduly delay or prejudice the
16 adjudication of the original parties' rights." Fed. R. Civ. P.
17 24(b)(3).

18 DISCUSSION

19 I. Motion for Class Certification

20 Plaintiffs move to certify two classes of inmates under Rules
21 23(b)(1) and 23(b)(2). First, they move to certify a "Due Process
22 Class" consisting of all inmates "serving indeterminate sentences
23 at the Pelican Bay SHU on the basis of gang validation, none of
24 whom have been or will be afforded meaningful review or
25 procedurally adequate review of their confinement." Docket No.
26 195, Class Cert. Mot. 1-2. Second, they move to certify an Eighth
27
28

1 Amendment Class¹ consisting of all inmates "who are now, or will
2 be in the future, imprisoned by Defendants at the Pelican Bay SHU
3 under the conditions and pursuant to the policies described below
4 for longer than 10 continuous years." Id. at 2.

5 Defendants contend that Plaintiffs' proposed definition of
6 the Due Process Class is ambiguous and that neither the proposed
7 Due Process Class nor the proposed Eighth Amendment Class
8 satisfies the requirements of Rule 23. As explained more fully
9 below, these arguments do not justify denying class certification.

10 A. Due Process Class Definition

11 Plaintiffs' proposed Due Process Class contains the terms
12 "meaningful review" and "procedurally adequate review," neither of
13 which is defined in the complaint. Defendants contend that,
14 because these terms lack a concrete meaning, the proposed class
15 definition is ambiguous and precludes certification. See Mazur v.
16 eBay Inc., 257 F.R.D. 563, 567 (N.D. Cal. 2009) (denying class
17 certification because an ambiguous term in proposed class
18 definition made "no reference to objective criteria" and meant
19 that "the class members themselves might not know if they were
20 members of the class"); Whiteway v. FedEx Kinko's Office & Print
21 Servs., 2006 WL 2642528, at *3 (N.D. Cal.) ("An implied
22 prerequisite to certification is that the class must be
23 sufficiently definite.").

24
25 _____
26 ¹ Plaintiffs originally characterized the Eighth Amendment Class as
27 a "subclass" of the Due Process Class. However, at the hearing, they
28 acknowledged that their proposed definition of the Eighth Amendment
Class conceivably could encompass inmates who are not members of the
proposed Due Process Class. Accordingly, this order refers to the
Eighth Amendment Class as a separate class rather than a subclass.

1 Although Defendants are correct that Plaintiffs' proposed
2 class definition is ambiguous, this ambiguity does not preclude
3 certification of the Due Process Class. As Plaintiffs
4 acknowledged at the hearing, the ambiguous terms can simply be
5 removed from their proposed class definition. Thus modified, the
6 Due Process Class would simply consist of all Pelican Bay inmates
7 who are currently assigned to an indeterminate SHU term on the
8 basis of gang validation. This amended class definition is both
9 precise and inclusive of all inmates who would benefit from the
10 declaratory and injunctive relief that Plaintiffs seek.
11 Furthermore, CDCR's own regulations treat this group as a distinct
12 class and provide a straightforward framework for distinguishing
13 between class members and non-members. See Cal. Code Regs. tit.
14 15, § 3341.5(c) (distinguishing "Indeterminate SHU Segregation"
15 from "Determinate SHU Segregation" and requiring all validated
16 gang members and associates to be assigned to indeterminate
17 terms). Thus, while the ambiguous terms of Plaintiffs' proposed
18 Due Process Class definition might require that the class
19 definition be amended, they do not require that class
20 certification be denied.

21 B. Rule 23(a)(1): Numerosity

22 Defendants have acknowledged that there are "approximately
23 1,100 inmates housed in Pelican Bay's SHU, the majority of which
24 are validated gang members and associates." Swift Decl. ¶ 6.
25 Plaintiffs assert that several hundred of these inmates have lived
26 in the SHU for over a decade. These numbers are sufficient to
27 satisfy the numerosity requirement for both the proposed Due
28 Process Class and the proposed Eighth Amendment Class.

1 C. Rule 23(a)(2): Commonality

2 As noted above, Rule 23(a)(2) requires that there be
3 "questions of law or fact common to the class." Fed. R. Civ. P.
4 23(a)(2). The Ninth Circuit has explained that this rule does not
5 preclude class certification if fewer than all questions of law or
6 fact are common to the class:

7 The commonality preconditions of Rule 23(a)(2)
8 are less rigorous than the companion
9 requirements of Rule 23(b)(3). Indeed, Rule
10 23(a)(2) has been construed permissively. All
11 questions of fact and law need not be common
12 to satisfy the rule. The existence of shared
13 legal issues with divergent factual predicates
14 is sufficient, as is a common core of salient
15 facts coupled with disparate legal remedies
16 within the class.

17 Hanlon v. Chrysler Corp., 150 F.3d 1011, 1019 (9th Cir. 1998).

18 Plaintiffs here have identified common issues of law and fact for
19 both proposed classes.

20 1. Due Process Class

21 Defendants contend that the implementation of the STG pilot
22 program precludes certification of the proposed Due Process Class.
23 They note that, under the STG program, CDCR has begun conducting
24 case-by-case reviews of all current SHU assignments and has
25 already transferred more than one hundred inmates from SHUs into
26 the general prison population. Hubbard Decl. ¶ 11. Because some
27 SHU inmates have received these new procedural protections and
28 others have not, Defendants contend that Plaintiffs cannot
establish commonality.

This argument does not justify denying class certification.
Even if some SHU inmates at Pelican Bay have been transferred to

1 other units or received additional procedural protections under
2 the STG program, Defendants have not shown that all Pelican Bay
3 SHU have received such protections. Many of the inmates in the
4 Pelican Bay SHU remain subject to the SHU assignment procedures
5 that were in place before the STG program was implemented and
6 which remain codified in CDCR's official regulations. Because
7 some inmates remain subject to these procedures -- which represent
8 the core of the "system-wide practice" that Plaintiffs seek to
9 challenge here -- Plaintiffs have satisfied Rule 23(a)'s
10 commonality requirement with respect to their proposed Due Process
11 Class. Armstrong v. Davis, 275 F.3d 849, 868 (9th Cir. 2001) ("We
12 have previously held, in a civil-rights suit, that commonality is
13 satisfied where the lawsuit challenges a system-wide practice or
14 policy that affects all of the putative class members."),
15 abrogated on other grounds by Johnson v. California, 543 U.S. 499,
16 504-05 (2005); see also Dukes, 131 S. Ct. at 2254 (recognizing
17 that a "uniform employment practice . . . would provide the
18 commonality needed for a class action" (emphasis added)).

19 That said, any inmates who have been placed in the STG
20 program or transferred out of the Pelican Bay SHU, must be
21 excluded from the proposed Due Process Class. Plaintiffs' due
22 process claim, as currently plead, only challenges the procedures
23 that were in place before CDCR implemented the STG program. Thus,
24 inmates who were placed in the STG program were subject to a
25 different set of procedures and lack commonality with inmates who
26 have only received the preexisting procedures. As explained at
27 the hearing, if Plaintiffs seek to challenge the STG program
28 procedures, they must seek leave to amend their due process claim.

1 2. Eighth Amendment Class

2 Defendants contend that Plaintiffs' Eighth Amendment claim
3 "presents a host of individual questions not subject to classwide
4 proof." Opp. 18. As noted above, however, the mere existence of
5 individual legal and factual questions is not sufficient to
6 preclude class certification. See Hanlon, 150 F.3d at 1019 ("All
7 questions of fact and law need not be common to satisfy the
8 rule."). Rather, to satisfy Rule 23(a)'s commonality requirement,
9 a plaintiff need only show that his or her claims raise some
10 questions that are amenable to classwide adjudication.

11 Plaintiffs have satisfied this requirement here. Their
12 Eighth Amendment claim raises several common questions of law and
13 fact including (1) whether long-term confinement inside the
14 Pelican Bay SHU exposes inmates to a "sufficiently serious"
15 deprivation of basic human needs and (2) whether Defendants acted
16 with a "sufficiently culpable state of mind" in assigning inmates
17 to the SHU for indefinite terms. See generally Farmer v. Brennan,
18 511 U.S. 825, 834 (1994) (explaining that, to establish that a
19 prisoner's Eighth Amendment rights have been violated, "the
20 deprivation alleged must be, objectively, 'sufficiently serious'"
21 and the "prison official must have a 'sufficiently culpable state
22 of mind'"). Plaintiffs have presented evidence to suggest that
23 the conditions inside the Pelican Bay SHU and the mental health
24 risks associated with long-term confinement there are common to
25 all putative class members. See, e.g., Kupers Decl. ¶ 15
26 ("[T]here is a clear and consistent pattern in the stories
27 articulated by these 10 men about the psychological consequences
28 of spending a decade or longer in the SHU."); Haney Decl. ¶ 10

1 ("[L]ong-term exposure to precisely the kinds of conditions and
2 practices that . . . appear to currently exist in the [Pelican Bay
3 SHU] places prisoners at grave risk of psychological harm.").

4 The fact that different inmates may exhibit different
5 symptoms or respond differently to prolonged SHU confinement does
6 not suffice to defeat commonality. Nor does the fact that some
7 inmates personally believe that they did not suffer any
8 psychological harm while they were confined in the SHU. Numerous
9 courts, including the Ninth Circuit, have held that "individual
10 factual differences among the individual litigants or groups of
11 litigants will not preclude a finding of commonality" in class
12 actions challenging a "system-wide" policy. Armstrong, 275 F.3d
13 at 868 (rejecting California prison officials' argument that "a
14 wide variation in the nature of the particular class members'
15 disabilities precludes a finding of commonality"); see also
16 Parsons v. Ryan, 289 F.R.D. 513, 523 (D. Ariz. 2013) (rejecting
17 Arizona prison officials' argument "that to determine whether
18 these conditions pose an unconstitutional risk of harm, the Court
19 must assess each individual class member's exposure to the alleged
20 conditions"), appeal docketed, No. 13-16396 (9th Cir. July 10,
21 2013). Indeed, "classes have been certified in a legion of civil
22 rights cases where commonality findings were based primarily on
23 the fact that defendant's conduct is central to the claims of all
24 class members irrespective of their individual circumstances and
25 the disparate effects of the conduct." Baby Neal v. Casey, 43
26 F.3d 48, 57 (3d Cir. 1994). Accordingly, because Plaintiffs have
27 identified questions of fact and law that are common to all class
28

1 members, they have satisfied the commonality requirement with
2 respect to the Eighth Amendment Class.²

3 As with the Due Process Class, however, any inmates who have
4 been transferred out of the Pelican Bay SHU must be excluded from
5 the Eighth Amendment Class. These inmates lack commonality with
6 inmates who remain housed in the Pelican Bay SHU and would not
7 benefit from any of the injunctive relief that Plaintiffs are
8 seeking here. If Plaintiffs seek to challenge the conditions of
9 confinement in any other housing unit or correctional facility,
10 they must seek leave to amend their Eighth Amendment claim.

11 D. Rule 23(a)(3): Typicality

12 Rule 23(a)(3)'s typicality requirement provides that a "class
13 representative must be part of the class and possess the same
14 interest and suffer the same injury as the class members."
15 Falcon, 457 U.S. at 156 (quoting E. Tex. Motor Freight Sys., Inc.
16 v. Rodriguez, 431 U.S. 395, 403 (1977)) (internal quotation marks
17 omitted). This requirement is meant to ensure "that the interest
18 of the named representative aligns with the interests of the
19 class." Hanon v. Dataproducts Corp., 976 F.2d 497, 508 (9th Cir.

21 ² Defendants continue to cite Madrid v. Gomez, 889 F. Supp. 1146
22 (1995), for the proposition that Plaintiffs' "alleged harms are
23 insufficient to state a claim" under the Eighth Amendment. Opp. 19.
24 This argument is not properly raised in an opposition to class
25 certification and, even if it was, the Court has already rejected it.
26 As the Court explained in its prior order, Madrid dealt only with
27 inmates who had been confined in the SHU for less than three years and
28 "expressly left open the possibility that longer periods of confinement
in the SHU -- such as those alleged here -- could implicate Eighth
Amendment concerns." Docket No. 191, April 9, 2013 Order, at 10; see
also Madrid, 889 F. Supp. at 1267 ("We can not begin to speculate on the
impact that Pelican Bay SHU conditions may have on inmates confined in
the SHU for periods of 10 or 20 years or more."). Thus, to the extent
Defendants contend that Madrid requires denial of class certification,
this argument is not persuasive.

1 1992). Rule 23(a)(3) is satisfied where the named plaintiffs have
2 the same or similar injury as the unnamed class members, the
3 action is based on conduct which is not unique to the named
4 plaintiffs, and other class members have been injured by the same
5 course of conduct. Id. Class certification is inappropriate,
6 however, "where a putative class representative is subject to
7 unique defenses which threaten to become the focus of the
8 litigation." Id. (quoting Gary Plastic Packaging Corp. v. Merrill
9 Lynch, Pierce, Fenner & Smith, Inc., 903 F.2d 176, 180 (2d Cir.
10 1990)).

11 As noted above, five of the named Plaintiffs in this case are
12 currently assigned to an indeterminate term in the Pelican Bay SHU
13 on the basis of gang validation. Each of these inmates has lived
14 in the SHU for at least ten years. Defendants have not identified
15 any unique defenses that they might raise against these five
16 Plaintiffs and, instead, argue that Plaintiffs cannot establish
17 typicality for the same reasons they cannot establish commonality.
18 These arguments fail for the reasons discussed above. See
19 Armstrong, 275 F.3d at 869 ("We do not insist that the named
20 plaintiffs' injuries be identical with those of the other class
21 members, only that the unnamed class members have injuries similar
22 to those of the named plaintiffs and that the injuries result from
23 the same, injurious course of conduct."); LaDuke v. Nelson, 762
24 F.2d 1318, 1332 (9th Cir. 1985) ("The minor differences in the
25 manner in which the representative's Fourth Amendment rights were
26 violated does not render their claims atypical of those of the
27 class." (footnote omitted)); Hanlon, 150 F.3d at 1020 ("Under the
28 rule's permissive standards, representative claims are 'typical'

1 if they are reasonably co-extensive with those of absent class
2 members; they need not be substantially identical.”).

3 In contrast to the five named Plaintiffs who remain housed in
4 the Pelican Bay SHU, the five inmates who have been transferred to
5 other units or facilities are not typical of other putative class
6 members. The transferred individuals have been subject to a
7 different set of housing assignment procedures than the putative
8 class and now live under different conditions of confinement. As
9 such, they may be subject to a unique set of defenses and do not
10 satisfy the requirements of Rule 23(a)(3).

11 E. Rules 23(a)(4) & 23(g)(2): Adequacy

12 Rule 23(a)(4) requires that class representatives “will
13 fairly and adequately protect the interests of the class.” Fed.
14 R. Civ. P. 23(a)(4). Rule 23(g)(2) imposes a similar requirement
15 on class counsel.

16 Defendants contend that two of Plaintiffs’ attorneys, Marilyn
17 McMahon and Carol Strickman, cannot adequately serve as class
18 counsel in this case because they are “fact witnesses” who may be
19 called to testify about their communications with Plaintiffs
20 regarding recent prisoner hunger strikes. Opp. 23.³ Defendants
21 have not explained how this testimony is relevant to this case nor
22 how it would be admissible. Any communications between Plaintiffs
23 and Ms. McMahon and Ms. Strickman would not only be subject to the
24 attorney-client privilege but also likely constitute hearsay.

25
26 ³ Defendants also initially argued that Ms. McMahon and Ms.
27 Strickman -- along with a third attorney, Anne Weills -- were inadequate
28 because Plaintiffs failed to submit evidence of their qualifications to
serve as class counsel. Because Plaintiffs subsequently submitted these
attorneys’ CVs with their reply brief, this argument is now moot.

1 Thus, because Defendants have not identified any legitimate
2 grounds to disqualify Plaintiffs' counsel, Plaintiffs have
3 satisfied the adequacy requirements of Rule 23(g).

4 As noted above, the five named Plaintiffs who have been
5 transferred out of the Pelican Bay SHU pursuant to the STG program
6 are not typical class members. This renders them inadequate class
7 representatives under Rule 23(a)(4). Thus, only the five named
8 Plaintiffs who currently remain housed in the Pelican Bay SHU may
9 adequately represent the class.

10 F. Rule 23(b)(1): Risk of Inconsistent Adjudications

11 As noted above, a class may be certified under Rule 23(b)(1)
12 if the prosecution of separate actions by individual members of
13 the class would create the risk of "inconsistent or varying
14 adjudications with respect to individual members of the class
15 which would establish incompatible standards of conduct for the
16 party opposing the class." Fed. R. Civ. P. 23(b)(1)(A). If each
17 of the hundreds of proposed members of either the Due Process
18 Class or the Eighth Amendment Class were forced to adjudicate his
19 claims individually, there would be a significant risk of
20 inconsistent judgments. Certification of both proposed classes is
21 therefore appropriate under Rule 23(b)(1).

22 G. Rule 23(b)(2): Grounds General Applicable to the Class

23 "Rule 23(b)(2) permits class actions for declaratory or
24 injunctive relief where 'the party opposing the class has acted or
25 refused to act on grounds generally applicable to the class.'"

26 Amchem Products, Inc. v. Windsor, 521 U.S. 591, 614 (2009)

27 (quoting Rule 23(b)(2)). "In a class-action lawsuit, Rule

28 23(b)(2) enables a trial court to determine the appropriateness of

1 system-wide relief based on the individual experiences of the
2 named plaintiffs." Armstrong, 275 F.3d at 871.

3 Plaintiffs in this case seek an injunction to cure alleged
4 violations of their Eighth and Fourteenth Amendment rights
5 resulting from a uniform set of CDCR policies and procedures.
6 These claims fall squarely within the realm of class claims
7 covered by Rule 23(b)(2). Parsons, 289 F.R.D. at 524
8 ("Plaintiffs' claims for injunctive relief stemming from allegedly
9 unconstitutional conditions of confinement are the quintessential
10 type of claims that Rule 23(b)(2) was meant to address."); see
11 also Baby Neal, 43 F.3d at 58-59 ("It is the (b)(2) class which
12 serves most frequently as the vehicle for civil rights actions and
13 other institutional reform cases that receive class action
14 treatment.").

15 Nevertheless, Defendants contend that certification is
16 inappropriate because Plaintiffs' requested injunctive relief
17 "exceeds the boundaries of Rule 65(d)." Opp. 25. Defendants have
18 not cited any authority to support this argument and numerous
19 courts have expressly held that plaintiffs are not required to
20 satisfy Rule 65(d) in order to obtain class certification. See,
21 e.g., Shook v. Board of County Comm'rs, 543 F.3d 597, 605 n.4
22 (10th Cir. 2008) (explaining that plaintiffs need not "come
23 forward with an injunction that satisfies Rule 65(d) with exacting
24 precision at the class certification stage"). Indeed, in many
25 class actions challenging the constitutionality of a system-wide
26 policy or practice, it would be difficult for a plaintiff to
27 determine precisely the appropriate scope of injunctive relief at
28

1 the class certification stage. Defendants' Rule 65(d) argument
2 therefore does not justify denying class certification here.

3 Defendants next contend that Plaintiffs' requested injunctive
4 relief "contravenes" the Prison Litigation Reform Act (PLRA)
5 because it would have an "adverse impact on public safety." Opp.
6 25. As with their Rule 65(d) argument, Defendants have failed to
7 cite any case law to support this contention. The provision of
8 the PLRA that they cite in their brief governs the scope of
9 injunctive relief that a federal court may issue in a "prison
10 conditions" case after liability has been assessed. 18 U.S.C.
11 § 3626(a)(1) ("Prospective relief in any civil action with respect
12 to prison conditions shall extend no further than necessary to
13 correct the violation of the Federal right of a particular
14 plaintiff or plaintiffs."). It does not impose any requirements
15 on plaintiffs seeking class certification under Rule 23(b)(2).
16 Accordingly, it does not preclude class certification here.

17 II. Motion to Intervene

18 CCPOA is a labor union that represents roughly 27,000 CDCR
19 correctional officers across the State of California. It moves to
20 intervene as of right on the grounds that it has an interest in
21 protecting the safety of its members. It contends that
22 Plaintiffs' requested injunctive relief -- particularly the
23 transfer of any inmates out of the Pelican Bay SHU -- would
24 jeopardize the safety of CDCR officers. In the alternative, it
25 argues that it should be granted leave to intervene permissively
26 because its motion is timely and it has defenses that share common
27 questions of law or fact with the main action. Neither of these
28 arguments is persuasive.

1 CCPOA has not explained why Defendants cannot adequately
2 protect the safety interests of CDCR officers in this litigation.
3 Wilderness Society, 630 F.3d at 1177 (requiring that “the
4 applicant’s interest must be inadequately represented by the
5 parties to the action”). In fact, it concedes that it plans to
6 present “substantially the same defenses as those the [current]
7 defendants are anticipated to present based on their motion to
8 dismiss.” Docket No. 233, CCPOA Mot. Intervene 8. CCPOA has also
9 failed to explain persuasively how its intervention in this action
10 would actually help it achieve its stated objective of preventing
11 any inmates from being transferred out of the Pelican Bay SHU. As
12 noted above, CDCR has already begun transferring inmates out of
13 the Pelican Bay SHU independently, even as these proceedings were
14 stayed. It is therefore not clear that CCPOA’s intervention in
15 this action would actually alter CDCR’s existing plans or
16 procedures. Thus, because intervention is not necessary to
17 protect the safety of CDCR employees, CCPOA may not intervene as
18 of right.⁴

19 Permissive intervention is also inappropriate here. The only
20 potential defenses that CCPOA would raise are entirely duplicative
21 of arguments that Defendants have already raised, as noted above.
22 Furthermore, CCPOA waited nearly a year after Plaintiffs filed
23 their 2AC before it moved to intervene even though its interests
24

25 ⁴ Notably, courts in this and other districts routinely dismiss
26 civil rights claims asserted by prisoners against CCPOA on the grounds
27 that CCPOA is not a proper defendant in such actions. See, e.g., Page
28 v. Acosta, 2009 WL 1357453, at *2 (N.D. Cal.) (dismissing Pelican Bay
inmate’s claims against CCPOA and noting that the “fact that an alleged
wrongdoer is the member of a union does not support liability for the
union”).

1 in this case became "ripe" when that complaint was filed. See
2 CCPOA Mot. Intervene 6 (stating that "the issues affecting CCPOA's
3 interests did not become ripe until the second amended complaint
4 was filed" in September 2012). For these reasons, intervention by
5 CCPOA at this stage would neither be productive nor timely.

6 Although CCPOA's request to intervene is denied, the Court
7 will grant CCPOA leave to file an amicus brief in support of
8 Defendants' dispositive motion.

9 CONCLUSION

10 For the reasons set forth above, Plaintiffs' motion for class
11 certification (Docket No. 195) is GRANTED in part and DENIED in
12 part.

13 The Court certifies the following Due Process Class under
14 Rules 23(b)(1) and 23(b)(2): all inmates who are assigned to an
15 indeterminate term at the Pelican Bay SHU on the basis of gang
16 validation, under the policies and procedures in place as of
17 September 10, 2012.

18 The Court certifies the following Eighth Amendment Class
19 under Rules 23(b)(1) and 23(b)(2): all inmates who are now, or
20 will be in the future, assigned to the Pelican Bay SHU for a
21 period of more than ten continuous years.

22 The Court certifies the five named Plaintiffs who are
23 currently housed in the Pelican Bay SHU to serve as class
24 representatives and certifies Plaintiffs' counsel to serve as
25 class counsel.

26 CCPOA's motion to intervene (Docket No. 233) is DENIED.
27 CCPOA may submit an amicus brief in support of Defendants'
28 dispositive motion. The amicus brief shall not exceed fifteen

1 pages and shall not repeat any arguments raised by Defendants in
2 their motion.

3 A case management conference will be held at 2:00 p.m. on
4 June 4, 2014.

5 IT IS SO ORDERED.

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7 Dated: 6/2/2014


CLAUDIA WILKEN
United States District Judge

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