UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

LADDY CURTIS VALENTINE and RICHARD ELVIN KING, individually and on behalf of those similarly situated, Plaintiffs,	§	
v.	§	Civil Action No. 4:20-cv-01115
BRYAN COLLIER, in his official capacity, ROBERT HERRERA, in his official capacity, And TEXAS DEPARTMENT OF CRIMINAL JUSTICE, Defendants.	§	

DEFENDANTS' RESPONSE IN OPPOSITION TO PLAINTIFFS' EMERGENCY MOTION FOR CLASS CERTIFICATION

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I. NATURE AND STAGE OF THE PROCEEDINGS

On March 30, 2020, Plaintiffs Valentine and King filed suit alleging that Defendants Collier and Herrera violated their rights under the Eighth Amendment and that Defendant TDCJ violated the Americans with Disabilities Act ("ADA") and the Rehabilitation Act ("RA") [ECF 1 at 1] Plaintiffs seek injunctive and declaratory relief. [ECF 1 at 31-34]

On April 16, 2020, the Court heard Plaintiffs' application for temporary restraining order and that same day entered a Preliminary Injunction Order. [ECF 40] On April 17, 2020. Defendants appealed the Court's order and were subsequently granted a stay of the preliminary injunction order pending resolution of the appeal. The appeal is still pending.

On May 13, 2020, Plaintiffs filed their Emergency Motion for Class Certification. [ECF 94] Plaintiffs Valentine and King propose to represent two classes: (1) all current and future inmates at the Pack Unit who are subject to TDCJ and the Texas Correctional Managed Health Care Committee's COVID-19 policies [ECF 94 at 25]; and (2) a "high-risk" subclass, mirroring the general class but focusing on individuals who Plaintiffs claim are most at risk of severe illness, injury, or death from COVID-19. *Id.* The proposed subclass includes: (1) people aged 65 years or older; (2) people with chronic lung disease or moderate to severe asthma; (3) people who have serious heart conditions; (4) people who are immunocompromised including patients undergoing cancer treatment; (5) people with other underlying medical conditions, particularly if not well controlled, including, but not limited to, those with diabetes, renal failure, or liver disease; and (6) people of any age with severe obesity (body mass index [BMI] ≥40). *Id.*

Plaintiffs forego any monetary damages and seek to certify a class solely under Rule 23(b)(2) of the Federal Rules of Civil Procedure. *Id.* at 45. In support of their proposed classes,

Plaintiffs contend that "Defendants' policy and practice of refusing adequate COVID-19 protections" is the glue that binds the class members together. *Id.*

II. ISSUES FOR CONSIDERATION

1. Whether Plaintiffs lack standing to represent a class since they failed to exhaust their administrative remedies prior to filing suit as required by the PLRA. Issues of standing are reviewed *de novo*. *Crane v. Johnson*, 783 F.3d 244, 250 (5th Cir. 2015).

2. Whether Plaintiffs failed to satisfy their burden to show commonality, typicality, and adequate representation under Federal Rule of Civil Procedure 23(a), such that class certification is improper. A district court's class certification decision is reviewed for an abuse of discretion. *Regents of Univ. of Cal. v. Credit Suisse First Bos. (USA), Inc.*, 482 F.3d 372, 380 (5th Cir. 2007). However, the district court must exercise its discretion "within the framework of Rule 23." *M.D. ex rel. Stukenberg v. Perry*, 675 F.3d 832, 836 (5th Cir. 2012) (quoting *McManus v. Fleetwood Enters., Inc.*, 320 F.3d 545, 548 (5th Cir. 2003)). "A trial court abuses its discretion when its ruling is based on an erroneous view of the law or a clearly erroneous assessment of the evidence." *Bocanegra v. Vicmar Servs., Inc.*, 320 F.3d 581, 584 (5th Cir. 2003).

3. Whether Plaintiffs failed to meet the requirements of specificity and efficiency under Federal Rule of Civil Procedure 23(b)(2), on their contention that Defendants have treated the members of the class as a class, making appropriate injunctive or declaratory relief with respect to the class as a whole, such that class certification is improper. A district court's class certification decision is reviewed for an abuse of discretion, *Regents of Univ. of Cal.*, 482 F.3d at 380, "within the framework of Rule 23," *Stukenberg*, 675 F.3d at 836. "A trial court abuses its discretion when

its ruling is based on an erroneous view of the law or a clearly erroneous assessment of the evidence." *Bocanegra*, 320 F.3d at 584.

III. SUMMARY OF THE ARGUMENT

Plaintiffs' claim that they could not exhaust their administrative remedies is belied by their own conduct: *After* they filed their Complaint, Plaintiffs initiated their administrative remedies by filing several grievances related to their COVID-19 claims. *See generally* Exhibits 1-4. Plaintiffs are *presently* pursuing their administrative remedies while at the same time representing to this Court that they had no administrative remedies to pursue. ECF 48 at 2-3 (arguing that exhaustion is not required); ECF 94 at 42 (explaining that they are attempting to exhaust their administrative remedies). Actions speak louder than words. Plaintiffs have viable administrative remedies to pursue through the grievance process; in fact, Plaintiffs have secured benefits via the grievance process just as the law intends. *See infra* at § IV.B.3. The Supreme Court has explained that one of the purposes of the PLRA's pre-filing exhaustion requirement is to protect the applicable administrative agency's authority by allowing it to correct its own mistakes (if any) rather than being immediately "haled into federal court." *See Woodford v. Ngo*, 548 U.S. 81, 89 (2006) (internal citations omitted).

Plaintiffs' motion for class certification should be denied for three principal reasons. First, in order to certify a class, at least one of the named plaintiffs is required to have exhausted his administrative remedies prior to filing suit. It is undisputed that neither named Plaintiff in this case exhausted their administrative remedies prior to filing suit. ECF 94 at 42-45. Therefore, Plaintiffs lack standing to represent a class, and the motion for class certification should be denied.

Second, class certification is improper because Plaintiffs fail to satisfy the requirements of commonality, typicality, and adequate representation under Rule 23(a). Plaintiffs have not shown commonality because they have failed to account for differences within the proposed classes, and they do not propose a common contention that is capable of class-wide resolution in a single stroke. Plaintiffs also fail to demonstrate typicality because there is nothing "typical" among offenders at the Pack Unit who have contracted COVID-19 and recovered, offenders who have contracted COVID-19 and are in the process of recovering, and offenders who have tested negative for the virus. Further, Plaintiffs do not meet the adequacy prong because: (1) by pursuing only declaratory and injunctive relief, they have created a conflict of interest between themselves and other proposed class members who may wish to pursue damages in the future; and (2) they have failed to show they will protect the interests of the proposed class members.

Third, Plaintiffs failed to satisfy the requirements of Rule 23(b)(2) because: (1) the injunctive relief they seek is not specific; and (2) certification will not promote the interests of efficiency.

IV. ARGUMENT AND AUTHORITY

A. Legal Standard for Class Certification

Under Rule 23, a party seeking class certification must establish the following prerequisites: (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).

Once a party satisfies the prerequisites of numerosity, commonality, typicality, and adequacy under Rule 23(a), that party must also satisfy Rule 23(b) by demonstrating one of the following: (1) a risk that separate actions would create incompatible standards of conduct for the defendant or prejudice individual class members not parties to the action; (2) the defendant has treated the members of the class as a class, making appropriate injunctive or declaratory relief with respect to the class as a whole; or (3) common questions of law or fact predominate over questions affecting individual members and that a class action is a superior method for fairly and efficiently adjudicating the action. *See* FED. R. CIV. P. 23(b)(1)–(3).

District courts must analyze Rule 23 with special attention. Certification is proper only where "the trial court is satisfied, after a *rigorous analysis*,"[1] that the Rule's requirements are met. "Rule 23 does not set forth a mere pleading standard." *Dukes v. United States,* 546 U.S. 1177 (2006). Instead, "[a] party seeking class certification must affirmatively demonstrate his compliance with the Rule—that is, he must be prepared to prove that there are *in fact* sufficiently numerous parties, common questions of law or fact," and so on. *Id.* To satisfy the rigor requirement, a district court must detail with specificity its reasons for certifying. *Vizena v. Union*

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[1] *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338, 350–51 (2011) (emphasis added); *see also Comcast Corp. v. Behrend*, 569 U.S. 27, 33 (2013) (same); *Gen. Tel. Co. of the Sw. v. Falcon*, 457 U.S. 147, 161 (1982) (same); *Stukenberg*, 675 F.3d at 837 ("It is well-established that a district court must conduct a rigorous analysis of the Rule 23 prerequisites before certifying a class.").

Pac. R.R., 360 F.3d 496, 503 (5th Cir. 2004) (per curiam). The court must rigorously consider both Rule 23(a)'s prerequisites[2] and the Rule 23(b) class type.[3]

B. Plaintiffs lack standing to represent a class because neither has exhausted their administrative remedies as required by the PLRA.

Before the Court determines whether class certification is proper, it must first determine whether Valentine and King—the named Plaintiffs in this case—have standing to assert the rights of others. *See Lewis v. Cain*, 324 F.R.D. 159, 163 (M.D. La. 2018). The Fifth Circuit has held that "[s]tanding is an inherent prerequisite to the class certification inquiry." *See Bertulli v. Indep. Ass'n of Cont'l Pilots*, 242 F.3d 290, 294 (5th Cir. 2001).

The Prison Litigation Reform Act ("PLRA") requires inmates to exhaust all available administrative remedies *before* filing suit in federal court to challenge prison conditions. 42 U.S.C. § 1997e(a). This exhaustion requirement is mandatory—there are no "futility or other [judicially created] exceptions [to the] statutory exhaustion requirements." *Booth v. Churner*, 532 U.S. 731, 741 n.6 (2001). In a putative class action case challenging prison conditions, the Fifth Circuit has explained that, as a prerequisite to class certification, at least one named plaintiff must have properly exhausted his administrative remedies prior to filing suit. *See Gates v. Cook*, 376 F.3d 323, 330 (5th Cir. 2004).

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[2] *See, e.g.*, *Dukes*, 564 U.S. at 350–51.

[3] *See Behrend*, 569 U.S. at 33–34, 133 S. Ct. 1426 ("[C]ertification is proper only if the trial court is satisfied, after a rigorous analysis, that the prerequisites of Rule 23(a) have been satisfied. ... The same analytical principles govern Rule 23(b)." (quotation marks removed)); *Castano v. Am. Tobacco Co.*, 84 F.3d 734, 742–43 (5th Cir. 1996) (holding that the district court had not engaged in a rigorous analysis of predominance—that is, whether a Rule 23(b)(3) class type was appropriate); *Madison v. Chalmette Ref., L.L.C.*, 637 F.3d 551, 556–57 (5th Cir. 2011) (same).

The Texas prison system has developed a two-step formal grievance process. *Johnson v. Johnson*, 385 F.3d 503, 515 (5th Cir. 2004). The Step 1 grievance, which must be filed within 15 days of the complained-of incident, is handled within the prisoner's facility of incarceration. *Id.* If the Step 1 grievance results in an adverse decision, the prisoner has 10 days to file a Step 2 grievance, which is handled at the state level. *Id.* The Fifth Circuit has held that an inmate must pursue a grievance through both steps for it to be considered exhausted. *Wright v. Hollingsworth*, 260 F.3d 357, 358 (5th Cir. 2001). In other words, exhaustion must be pursued to its conclusion. *See id.*

1. Neither Valentine nor King exhausted their administrative remedies prior to filing suit.

Plaintiffs lack standing to represent a class because it is undisputed that neither exhausted his administrative remedies as required by the PLRA. Not only did King and Valentine fail to complete the two-step grievance process, they did not even initiate the grievance process before filing their lawsuit. *See Valentine v. Collier*, 956 F.3d 797, 806 (5th Cir. 2020) (Higginson, J., concurring). This is not disputed. Since neither Valentine nor King exhausted his available administrative remedies before filing suit, they lack standing to represent the putative class in this case. *See Gates*, 376 F.3d at 330. As such, certification of the class is improper.

2. Plaintiffs have not shown that their administrative remedies were unavailable.

The PLRA requires inmates to exhaust "such administrative remedies as are available" before filing suit in federal court to challenge prison conditions. 42 U.S.C. § 1997e(a). The Supreme Court has made clear that the exhaustion requirement applies to all suits regarding prison life, *Porter v. Nussle*, 534 U.S. 516, 532 (2002), and that "unexhausted claims cannot be brought in court," *Jones v. Bock*, 549 U.S. 199, 211 (2007). Exhaustion is mandatory. The statute

provides no exception for "special circumstances." *See Ross v. Blake*, 136 S. Ct. 1850, 1856-57 (2016); *see also Farmer v. Brennan,* 511 U.S. 825, 847 (1994) (in a case seeking injunctive relief to address "current" prison conditions, inmates are not "free to bypass adequate internal prison procedures and bring their health and safety concerns directly to court"); *Valentine v. Collier*, 956 F.3d at 805. And there are no "futility or other [judicially created] exceptions [to the] statutory exhaustion requirements." *Booth*, 532 U.S. at 741 n.6.

The PLRA creates an exception to the exhaustion requirement only when administrative remedies are not "available." A remedy is not "available"—and exhaustion is not required—when:

> (1) the procedure "operates as a simple dead end" because "the relevant administrative procedure lacks authority to provide any relief," or "administrative officials have apparent authority, but decline ever to exercise it";
>
> (2) the "administrative scheme [is] so opaque that . . . no reasonable prisoner can use them"; or
>
> (3) "prison administrators thwart inmates from taking advantage of a grievance process through machination, misrepresentation, or intimidation."

Ross, 136 S. Ct. at 1859–60 (quotation omitted). When the State provides administrative remedies, the prisoner bears the burden to prove that those remedies are not available. *See, e.g.*, *Rinaldi v. United States*, 904 F.3d 257, 268 (3d Cir. 2018) ("[T]he onus falls on the inmate to show that such remedies were unavailable to him."); *accord Albino v. Baca*, 747 F.3d 1162, 1172 (9th Cir. 2014) (en banc); *Tuckel v. Grover*, 660 F.3d 1249, 1254 (10th Cir.2011); *Turner v. Burnside*, 541 F.3d 1077, 1082 (11th Cir.2008); *Foulk v. Charrier*, 262 F.3d 687, 697 (8th Cir.2001).

Plaintiffs acknowledge that TDCJ has a grievance process, but they maintain that administrative remedies are not "available" because TDCJ might not resolve their grievances

quickly enough. ECF 48. Plaintiffs argue, in effect, that TDCJ's grievance process resembles what *Ross* referred to as a "dead end." *See* 136 S. Ct. at 1859. The Fifth Circuit has cast doubt on this speculative assertion. *See Valentine v. Collier*, 956 F.3d at 804. And the Supreme Court has made clear that the administrative process qualifies as a "dead end" only when it creates no "potential" for an inmate to obtain relief. *See Ross*, 136 S. Ct. at 1859. As long as the State's administrative procedure grants "authority to take *some* action in response to a complaint," that procedure is considered "available," even if it cannot provide "the remedial action an inmate demands." *Id.* at 736 (emphasis added); *see also id.* at 739 ("Congress meant to require procedural exhaustion regardless of the fit between a prisoner's prayer for relief and the administrative remedies possible.").

Plaintiffs' argument turns *Ross* on its head. They contend that administrative remedies are not "available" because it is possible that the grievance process will not provide the remedy they seek—they speculate, for instance, that TDCJ *could* take the maximum length of time allowable to respond to their grievances and *might* even request an extension to resolve the grievances. But the Fifth Circuit has already explained, in this case, that dissatisfaction with TDCJ's grievance process does not mean that the process was unavailable:

> All parties agree that the TDCJ administrative process is open for Plaintiffs' use. And Plaintiffs do not argue that TDCJ is incapable of providing *some* (albeit inadequate) relief. Nor do they contend that TDCJ always "decline[s] to exercise" its authority, that the scheme is unworkably opaque, or that administrators thwart use of the system. Therefore, according to the standards the Supreme Court has given us, TDCJ's grievance process is "available," and Plaintiffs were required to exhaust.

Valentine, 956 F.3d at 804 (internal citations omitted). The mere possibility that the grievance process might not provide the exact relief Plaintiffs seek does not make those administrative

remedies unavailable. To the contrary, the possibility that Plaintiffs might obtain *some relief* through TDCJ's grievance process proves that administrative remedies are "available" under the PLRA.

3. Plaintiffs' utilization of TDCJ's grievance procedure demonstrates its availability.

Plaintiffs maintain that exhaustion was not necessary in this case, though simultaneously each have filed multiple grievances during the pendency of this case. *See generally* Exhibits 1-4. Plaintiffs' utilization of the grievance procedure firmly demonstrates that the procedure *is* available to them.

Since this case was filed, Valentine has filed at least four Step 1 grievances. *See* Exhibits 1-2. His first grievance, dated March 31, 2020, complained about the lack of "hand sanitizing solutions" and cleaning supplies for individual cubicles. *See* Exhibit 1 (Grievance No. 2020098479). His second grievance, dated May 4, 2020, complained of a lack of sanitization in the shower and dressing room areas. *See* Exhibit 2 (Grievance No. 2020115822). His third grievance, dated May 10, 2020, demanded that he be tested for COVID-19. *See id.* (Grievance No. 2020119641). His fourth grievance, dated May 19, 2020, requested that the Pack Unit utilize Dorm 14 to facilitate social distancing. *See id.* (Grievance No. 2020124948).

King has filed at least two Step 1 grievances and one Step 2 grievance. King dated his first grievance April 2, 2020, where he complained that offenders were being brought to the Pack Unit from other units. *See* Exhibit 3 (Grievance No. 2020099042). King's Step 2 grievance, dated May 7, 2020, relates to his offender-transportation complaint and claims that offenders on medical chain were still being transported to the Pack Unit. *See* Exhibit 4 at 2276-2277 (Grievance No. 2020099042). King's second Step 1 grievance, dated May 12, 2020, asks who is responsible for

determining the amount of chemicals issued to dorm janitors for cleaning. *See id.* at 2274-2275 (Grievance No. 2020120907).

Together, Plaintiffs have filed at least seven grievances since this case was filed. It certainly cannot be said, then, that TDCJ's grievance procedure is "so opaque" that it is practically incapable of use. *See Ross*, 136 S. Ct. at 1859. Indeed, Valentine and King have both utilized the grievance procedure, and they appear to have had no difficulty in navigating it. Therefore, Plaintiffs have affirmatively demonstrated that TDCJ's grievance process is capable of use. *Ross*, 136 S. Ct. at 1859. Plaintiffs' heavy utilization and successful navigation of TDCJ's grievance procedures also dispels any notion that Pack Unit officials have thwarted them from taking advantage of the grievance process through machination, misrepresentation, or intimidation. *See id.* at 1860.

Finally, Plaintiffs have affirmatively demonstrated that TDCJ's grievance procedure does not operate as a "dead end" because many of their complaints have been resolved to their satisfaction. For example, Valentine complained about the lack of "hand sanitizing solutions," yet he and all other offenders at the Pack Unit have unlimited access to soap and water. ECF 126-1 at 14, 18. Valentine's complaint about COVID-19 testing was also resolved to his satisfaction. Pack Unit officials have already conducted mass testing of both the offender population and the employees at the Pack Unit just days after Valentine submitted his grievance. ECF 126-1 at 2-8. Additionally, Valentine's complaint about the utilization of Dorm 14 was resolved: Dorm 14 is now being used as COVID-19 housing for offenders who have tested positive for COVID-19. *Id.* at 10. King's desire to stop offenders from entering the Pack Unit from other units has been resolved. The Pack Unit is on precautionary lockdown, and there are no transfers in or out of the

unit except for medically necessary appointments or emergencies. ECF 36-9 at 5. Additionally, any offender who returns to the Pack Unit from a free-world hospital visit is quarantined for 14 days in the unit's education building. ECF 126-1 at 11.

In sum, Plaintiffs are successfully navigating TDCJ's grievance procedure, and they are largely getting the results they request. Therefore, it simply cannot be said that TDCJ's grievance procedure is "unavailable" to them. *Ross*, 136 S. Ct. at 1859–60. Because TDCJ's grievance procedure was available, Plaintiffs were required to exhaust their administrative remedies prior to filing suit. *See Booth*, 532 U.S. at 741 n.6.

The Fifth Circuit has *never* allowed a prisoner to bypass the PLRA by bringing a federal lawsuit without exhausting administrative remedies. Neither have any of its sister Circuits. Plaintiffs have not cited a single case to support that result. There is a reason no such precedent exists: it is obviously contrary to the plain language and spirit of the PLRA.

Because Valentine and King failed and refused to exhaust their administrative remedies before filing suit, they lack standing to represent a class. *Gates*, 376 F.3d at 330. As a result, class certification is improper as a matter of law.

C. Plaintiffs fail to meet the requirements of Rule 23(a).

Even assuming *arguendo* Plaintiffs had standing to represent a class, they do not meet all the necessary requirements to obtain class certification under Rule 23(a). Specifically, Plaintiffs fail to meet the commonality, typicality, and adequate representation prongs.[4] Since Plaintiffs cannot meet each of Rule 23(a)'s requirements, class certification is improper.

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[4] Defendants do not contest that the numerosity factor is met.

1. Commonality

Plaintiffs have failed to meet their burden to establish commonality. To establish commonality, a plaintiff must prove a contention that is: (1) "common" to all the class members; (2) "central" to the validity of their claims; and (3) "capable" of class-wide resolution in a single stroke. *In re Deepwater Horizon*, 739 F.3d 790, 811 (5th Cir. 2014). Plaintiffs have failed to demonstrate facts showing commonality in this case. Therefore, there is no common contention that is capable of a class-wide resolution in a single stroke. *See In re Deepwater Horizon*, 739 F.3d at 811.

In *Dukes*, the Supreme Court observed "[a]ny competently crafted class complaint literally raises 'common questions.'" *Dukes*, 564 U.S. at 349 (citation omitted). Because "[c]ommonality requires the plaintiff to demonstrate that the class members 'have suffered the same injury,'" *id.* at 350 (citation omitted), the movant must do more than identify common legal theories or general questions that are undisputed or peripheral to the determination of liability. *Id.* The Court gave examples of common questions that were insufficient,[5] and focused instead on the "crucial question" of "*why was I disfavored?*" *Id.* at 352. The focus was appropriately on whether *each* class member suffered *a common* injury as a result of the *same* conduct. *Id.* The Court characterized the question as "crucial" because the class claims must depend upon a common contention "of such a nature that it 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

[5] Insufficient common questions of fact included: "Do all of us plaintiffs work for Wal-Mart? Do our managers have discretion over pay? Is that an unlawful employment practice? What remedies should we get?" The Court concluded that "[r]eciting these questions is not sufficient to obtain class certification." 564 U.S. at 349.

of the claims in one stroke."[6] *Id.* at 350.

Before *Dukes*, the Fifth Circuit treated commonality as met "when there is at least one issue, the resolution of which will affect all or a significant number of the putative class members." *Forbush v. J.C. Penny Co., Inc.*, 994 F.2d 1101, 1106 (5th Cir. 1993). Recognizing that "the *Wal-Mart* decision has *heightened* the standards for establishing commonality under Rule 23(a)(2),"[7] however, the Fifth Circuit in *M.D.* expressly repudiated *Forbush* and described at length how *Dukes* establishes a higher legal standard for commonality: "[T]he commonality test is no longer met when the proposed class merely establishes that 'there is at least one issue whose resolution *will affect all or a significant number* of the putative class members." *M.D.*, 675 F.3d at 840 (citing and repudiating *Forbush,* 994 F.2d at 1106 (internal quotation marks omitted)).

Citing *Dukes*, the Fifth Circuit in *M.D.* explained: "Rule 23(a)(2) requires that all of the class members' claims depend on a common issue of law or fact whose resolution 'will *resolve* an issue that *is central to the validity* of each one of the [class member's] claims in one stroke.'" 675 F.3d at 840 (quoting *Dukes,* 131 S. Ct. at 2551). It is no longer sufficient that the common question merely "affect" a "significant number" of class members. Resolution of the common question must "resolve" an issue that is central to validity of "each class member's" claims.

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[6] The Fifth Circuit in *M.D.* emphasized significant aspects of this holding as follows: "Rather, Rule 23(a)(2) requires that all of the class member's claims depended on a common issue of law or fact whose resolution "will *resolve* an issue that *is central to the validity* of the each of the [class member's] claims in one stroke." 675 F.3d at 840 (emphasis in original).

[7] 675 F.3d at 839 (emphasis added); *see also id.* at 837 ("In its recent opinion in *Wal-Mart* . . . the Supreme Court has further defined the contours of the 'rigorous analysis' required by Rules 23(a) and 23(b)(2).").

The Fifth Circuit has made clear that to be common under Rule 23, a question must also be capable of class-wide determination using class-wide proof. *Ahmad v. Old Republic National Title Ins. Co.*, 690 F.3d 698, 701 (5th Cir. 2012); *Benavides v. Chicago Title Ins. Co.*, 636 F.3d 699, 703 (5th Cir. 2011). A common question of fact must be capable of being "definitively answered for all class members using a generalized set of facts and producing one unified conclusion." *Ahmad*, 690 F.3d at 703; *Benavides*, 636 F.3d at 703. The question must "invite a 'yes' or 'no' answer or present a contention whose 'truth or falsity' can be established." *Ahmad*, 690 F.3d at 704.

Plaintiffs' certification motion fails to satisfy their evidentiary burden to prove by a preponderance of the evidence that the differences within the proposed classes will not defeat commonality because: (1) Plaintiffs fail to meet the "same injury" requirement; and (2) their list of common questions is insufficient to establish commonality.

Plaintiffs fail to meet the "same injury" requirement. Plaintiffs have failed to show that each member of the proposed classes has suffered from the "same injury," which defeats a finding of commonality. *See M.D.*, 675 F.3d at 840. For example, some offenders at the Pack Unit have tested positive for COVID-19, have recovered from the virus, and are presumably building up antibodies that should prevent them from re-contracting the virus. Other offenders at the Pack Unit have tested positive for COVID-19 and are in the process of recovering in one of the "medically isolated" dorms as their needs are being attended to by medical staff. Still other offenders at the Pack Unit have tested negative for COVID-19. The failure to sustain the "same injury" precludes a finding of "commonality" for this purported class.

Further, not all members of the Pack Unit are housed in areas with a risk of COVID-19 exposure. As the Court is aware, TDCJ coordinated with the Texas Department of Emergency Management ("TDEM") to engage in mass testing of the offender population at the Pack Unit and TDCJ staff working at the Pack Unit. ECF 126-1 at 2. Since that time, TDCJ has implemented proactive measures to medically isolate[8] those offenders who test positive for COVID-19 from those who test negative. *Id.* at 3-4. Employees who test positive are placed in self-quarantine at home. *Id.* at 4. For any offender or employee who tests positive at the Pack Unit, contact tracing is conducted. *Id.* Offenders and TDCJ employees who may have been exposed to a positive case are placed on medical restriction.[9] *Id.*

As TDCJ receives test results for the offender population at the Pack Unit, it is re-allocating those offenders to specific dorms depending on whether their tests are positive or negative. *See* Exhibit 1 at 10. For example, due to a concentration of offenders assigned to D-Hall who tested positive, Pack Unit officials designated the four dorms in D-Hall—Dorms 13, 14, 15, and 16—as COVID-19 housing for offenders who received a positive test result. *Id.* at 10. Offenders from Dorms 17 and 19 who had previously tested positive were relocated to D-Hall. *Id.* All dorms in D-Hall were placed in medical isolation. *Id.* TDCJ also has designated dorms specifically for those offenders who have received negative test results. *Id.* Therefore, some

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[8] "Medical isolation" is for persons who are sick and contagious, and it is used to separate ill persons who have a communicable disease from those who are healthy. *See* Exhibit 1 (CMHC Infection Control Manual, Policy B-14.52, Effective Date 5/13/2020) at 2.

[9] "Medical restriction" is used to separate and restrict the movement of well persons who may have been exposed to a communicable disease. *See* Exhibit 1 at 2.

members of the Pack Unit are housed—and being medically restricted—in dorms where no positive tests have emerged. This difference in circumstances (between offenders in designated negative dorms and offenders who have tested positive or were in contact with someone who has tested positive) precludes all the proposed class members from establishing that they have suffered the "same injury." *See Dukes*, 564 U.S. at 349. While the Fifth Circuit has indicated that individual differences in medical conditions may not defeat commonality under some circumstances,[10] individual differences in housing—or exposure to the risk of COVID-19—could very well defeat a finding of commonality.

The potential variance in risk for exposure could also present an exhaustion issue that would not be common to all class members. *In Sowell v. TDCJ*, this Court considered whether the plaintiff was required to exhaust prior to filing his suit, where he alleged that TDCJ was deliberately indifferent to his medical needs by not testing all inmates in the Estelle Unit for COVID-19. No. H-20-1492, 2020 WL 2113603, at **1-3 (S.D. Tex. May 4, 2020). The Court indicated that there must be a threshold showing of "imminent danger" for a Court to find that TDCJ's grievance procedure was "unavailable," such that exhaustion under the PLRA was not required. *See id.* at 3. The Court concluded that Sowell did not allege facts showing that he was in imminent danger of contracting COVID-19 and, therefore, he was required to exhaust his administrative remedies prior to filing suit. *Id.*

In this case, the differences in risk of exposure could prevent some proposed class members from showing "imminent danger." This could lead to different exhaustion analyses

[10] *Yates v. Collier*, 868 F.3d 354, 364–65 (5th Cir. 2017).

between the proposed class members, which would prevent the Court from resolving the putative class's issue in "one stroke." *See M.D.*, 675 F.3d at 840.

Plaintiffs' list of alleged "common questions" is insufficient to establish commonality. Many of Plaintiffs' "common questions" are similar to those held insufficient to establish commonality in *Dukes*. For example, Plaintiffs ask: (1) What are Defendants' policies and practices for addressing COVID-19 at the Pack Unit?; (2) What measures are feasible and appropriate to adequately reduce the serious health risk to the class members that COVID-19 poses?; (3) Will the class members face similar (or worse) health risks in the future?; and (4) Are the members of the General Class entitled to declaratory and injunctive relief? ECF 94 at 30; *cf. Dukes*, 564 U.S. at 349 ("Do all of us plaintiffs work for Wal-Mart? Do our managers have discretion over pay? Is that an unlawful employment practice? What remedies should we get?"). These questions are insufficient to establish commonality because they are not central to the validity of Plaintiffs' claims. *See M.D.*, 675 F.3d at 840. None of the questions address a subjective knowledge of a risk of substantial harm, which is a central issue in a deliberate indifference analysis.

Moreover, other questions fail to establish commonality because they simply reframe the ultimate legal issue (i.e., alleged deliberate indifference). These questions include: (1) Are the Defendants subjectively aware of the danger to the class members at the Pack Unit; (2) Do Defendants deliberately withhold adequate and recommended COVID-19 protections from class members?; and (3) Does exposing all prisoners to a substantial risk of COVID-19 infection violate the Eighth Amendment? That is insufficient under *Dukes*, which makes plain that commonality requires more than an allegation that the class members "have all suffered a violation of the same

provision of law." *Dukes*, 564 U.S. at 350; *see also Stukenberg*, 675 F.3d at 842 (holding that "the district court's certification of 'common questions of law, based upon Plaintiffs' claims of constitutional violations, namely substantive and procedural due process, along with associational rights' lacks the specificity required for [the Court] to determine whether the alleged common questions of law satisfy the requirements of Rule 23(a)(2)"); *Jamie S. v. Milwaukee Public Schs.*, 668 F.3d 481, 498 (7th Cir. 2012) (holding that the "generic question" whether the defendant fulfilled its statutory obligation to each class member, though part of every class member's claim, could not support a finding of commonality). Moreover, without reference to what "adequate and recommended COVID-19 protections" are, these questions cannot be meaningfully answered on a class-wide basis. *See Dukes,* 564 U.S. at 356–57.

Ultimately, Plaintiffs have not accounted for variances between members of the proposed class and subclass that defeat commonality. Additionally, they have not demonstrated a common contention that is capable of class-wide resolution. Plaintiffs' allegations, therefore, do not support a finding of commonality. *See M.D.*, 675 F.3d at 840.

2. Typicality

Plaintiffs have not met Rule 23(a)'s typicality prong for two reasons: (1) since they failed to exhaust their administrative remedies, Plaintiffs have no claim against which the proposed classes' claims can be assessed; and (2) they have failed to demonstrate typicality due to variances in risk exposure.

Since Plaintiffs failed to exhaust their administrative remedies, they have no claims against which the proposed classes' claims can be assessed. Under Rule 23(a)(3) the proposed class representative must have claims or defenses that are typical of the class. *See* Fed. R. Civ. P.

23(a). The requirement presumes the existence of a class claim against which typicality can then be measured.

Here, Plaintiffs' failure to exhaust their administrative remedies precludes a finding of typicality. Again, it is undisputed that Plaintiffs failed to exhaust their administrative remedies prior to filing suit in this case. The fact that they are now taking steps to exhaust their remedies—only *after* they filed suit—is meaningless. *See Neal v. Goord*, 267 F.3d 116, 123 (2d Cir. 2001) ("[A]llowing prisoner suits to proceed, so long as the inmate eventually fulfills the exhaustion requirement, undermines Congress' directive to pursue administrative remedies prior to filing a complaint in federal court."); *Freeman v. Francis*, 196 F.3d 641, 645 (6th Cir. 1999) ("The prisoner, therefore, may not exhaust administrative remedies during the pendency of the federal suit."). Since Plaintiffs only began attempting to exhaust their remedies after they filed suit, they do not have any claim that is properly before the court. As such, there is no claim against which typicality can be measured. Therefore, Plaintiffs are unable to establish that they have claims and defenses typical of the proposed classes. *See* FED. R. CIV. P. 23(a)(3).

Plaintiffs have failed to demonstrate typicality due to variances in risk exposure. As the Supreme Court explained in *Dukes*, "[t]he commonality and typicality requirements of Rule 23(a) tend to merge." *Dukes*, 546 U.S. at 349 n.5. Therefore, in the same way Plaintiffs have failed to demonstrate commonality due to variances in risk expose that exist between the members of the proposed classes, they have likewise failed to demonstrate typicality as well. Again, in response to the mass testing initiated by TDCJ and TDEM, Pack Unit officials have isolated those offenders who have tested positive for COVID-19 from those that have received negative results. *See supra at* § IV.C.1. Typicality simply cannot exist under these circumstances. Offenders who

have tested negative and who are medically restricted to areas designated for negative-only offenders may not be able to show a substantial risk of serious harm—a prerequisite to prevail on a deliberate indifference claim. *See Farmer v. Brennan*, 511 U.S. 825, 839 (1994). Moreover, these offenders may be unable to make a threshold showing of "imminent danger." These could impact the Court's analysis on exhaustion. *See Sowell*, 2020 WL 2113603, at *3. Under either scenario, Plaintiffs cannot demonstrate that their claims and defenses are typical of the proposed classes.

3. Adequate Representation

Plaintiffs have not shown that they will adequately protect the interests of the putative class because: (1) Plaintiffs have not shown that they will protect the interests of the other putative class members; and (2) Plaintiff's choice to pursue only declaratory and injunctive relief creates a conflict of interest between them and the other putative class members.

Adequacy encompasses three separate but related inquiries: (1) "the zeal and competence of the representative[s'] counsel"; (2) "the willingness and ability of the representative[s] to take an active role in and control the litigation and to protect the interests of absentees"; and (3) the risk of "conflicts of interest between the named plaintiffs and the class they seek to represent." *Feder v. Elec. Data Sys. Corp.*, 429 F.3d 125, 130 (5th Cir. 2005) (quoting *Berger v. Compaq Comp. Corp.*, 279 F.3d 313, 313–14 (5th Cir. 2002)). The adequacy inquiry "serves to uncover conflicts of interest between the named plaintiffs and the class they seek to represent." *See Amchem Prods., Inc.*, 521 U.S. at 594. Differences between named plaintiffs and absent class members make named plaintiffs inadequate representatives if those differences create a conflict of interest between the named plaintiffs and the class members. *Jenkins v. Raymark Industries*, 782 F.2d 468, 472 (5th Cir. 1986).

It is Plaintiffs' burden to establish adequacy. The Fifth Circuit has explicitly stated that any presumption that the class representative is adequate "inverts the well-established rule that the party seeking certification bears the burden of establishing all elements of rule 23(a)." *Berger v. Compaq Computer Corp.*, 257 F.3d 475, 481 (5th Cir. 2001). "Even more unsettling," when such a presumption occurs, it "ignores the constitutional dimensions of the adequacy requirement, which implicates the due process rights of all members who will be bound by the judgment." *Id.* Rather than presuming adequacy, the Fifth Circuit has described "[t]he adequacy requirement [as one that] mandates an inquiry into . . . the willingness and ability of the representatives to take an active role in and control the litigation and to protect the interests of absentees." *Horton v. Goose Creek Indep. Sch. Dist.*, 690 F.2d 470, 484 (5th Cir. 1982).

Plaintiffs have not shown that they will protect the interests of the putative class members. To meet Rule 23 requirements, the Court must find that the relationship between class representatives and their counsel are adequate to protect the interests of absent class members. *Stirman v. Exxon Corp.,* 280 F.3d 554, 562 (5th Cir. 2002). Class representatives must satisfy the court that they, and not counsel, are directing the litigation. *Unger v. Amedisys Inc.*, 401 F.3d 316, 321 (5th Cir. 2005). A simple determination that no conflicts exist to preclude certification, "is not a sufficiently 'rigorous' analysis to demonstrate that [the class representative] is an adequate representative." *Stirman*, 280 F.3d at 563.

Plaintiffs' adequacy argument focuses primarily on the adequacy of class counsel—not on their own representation of the class. ECF 94 at 40-45. While Plaintiffs point to the fact that King has been found to be an adequate representative of a class in a separate suit, they allege no facts—other than King's participation in an evidentiary hearing—that he will continue to actively

participate in the case and protect the interests of the putative class members. ECF 94 at 42. In fact, King's deposition testimony reveals that he has little understanding of the claims he has brought and his role as a class representative. King testified that he does not know what a putative class action is. Exhibit 5 (King Depo. at 142:17-19). He could not articulate the specific characteristics of the proposed classes. *Id.* at 143:8-19. He did not know what his responsibilities as a class representative would be. *Id.* at 143:20-24; 144:1-9. Finally, King could not articulate the legal claims he has brought on behalf of the proposed classes. *Id.* at 145:18-25; 146:1-2. Plaintiffs make no mention of Valentine's ability to adequately represent the putative classes. Since Plaintiffs have not shown that they are capable of driving the litigation in this case, they have not shown they are capable of adequate representation. *See Unger*, 401 F.3d at 321.

To further support their argument that they are adequate class representatives, Plaintiffs also argue that they are attempting to exhaust their administrative remedies under the PLRA. ECF 94 at 42-45. But this argument demonstrates precisely why Plaintiffs are *not* adequate representatives: since they did not exhaust their administrative remedies before filing suit—and since they have not shown TDCJ's remedies were unavailable—neither King nor Valentine have standing to represent a class. *See infra* at § IVB.1.-2. Since their failure to exhaust is fatal to their claims, Valentine and King are not capable of protecting the interests of other class members.

Plaintiffs' choice to pursue only declaratory and injunctive relief creates a conflict of interest between them and the other putative class members. As a general rule, the decision in a class action is binding on the parties in subsequent litigation. *Cooper v. Fed. Reserve Bank of Richmond*, 467 U.S. 867, 874 (1984). "Basic principles of *res judicata* (merger and bar or claim preclusion) and collateral estoppel (issue preclusion) apply. A judgment in favor of the plaintiff

class extinguishes their claim, which merges into the judgment granting relief." *Id.* "[B]ecause absent class members are conclusively bound by the judgment in any class action brought on their behalf, the court must be especially vigilant to ensure that the due process rights of all class members are safeguarded through adequate representation at all times." *Berger*, 257 F.3d at 480.

Deciding whether a class representative's decision to forego certain claims defeats adequacy requires an inquiry into: (1) the risk that unnamed class members will forfeit their right to pursue the waived claim in future litigation, (2) the value of the waived claim, and (3) the strategic value of the waiver, which can include the value of proceeding as a class (if the waiver is key to certification). *Slade v. Progressive Sec. Ins. Co.*, 856 F.3d 408, 413 (5th Cir. 2017). The Fifth Circuit has refused to certify purported classes based on the risk that the absent class members would be precluded from litigating potentially valuable claims in the future. *See McClain v. Lufkin Indus. Inc.*, 519 F.3d 264, 283 (5th Cir. 2008) (refusing to certify a class action because of perceived risk of down the line preclusion).

Here, Plaintiffs have chosen to seek certification under Rule 23(b)(2), under which class members are not permitted to opt out from the action. § 1786 Notice in Class Actions—Due-Process Requirements, 7AA Fed. Prac. & Proc. Civ. § 1786 (3d ed.). Section 1983, the ADA, and the RA generally allow a plaintiff to recover monetary damages. But if the Court certifies the proposed class in this case under Rule 23(b)(2), each of the members will be prevented from opting out of the suit and seeking monetary damages in the future should they wish to bring individual-capacity claims against the individual Defendants. Plaintiffs' decision to seek only declaratory and injunctive relief creates a conflict of interest because the remaining members of the proposed class will not be able to pursue monetary relief in the future should the Plaintiffs

succeed on their claims. The Court, therefore, should find that Plaintiffs have failed to demonstrate adequacy. *See Slade*, 856 F.3d at 413. Plaintiffs' failure to establish their adequacy as representatives to protect the interests of absent class members, in addition to their failure to establish the commonality and typicality, precludes class certification.

D. Plaintiffs fail to meet Rule 23(b)'s requirement of specificity.

If and when a party satisfies the prerequisites of numerosity, commonality, typicality, and adequacy, it must also demonstrate one of the following: (1) a risk that separate actions would create incompatible standards of conduct for the defendant or prejudice individual class members not parties to the action; (2) the defendant has treated the members of the class as a class, making appropriate injunctive or declaratory relief with respect to the class as a whole; or (3) common questions of law or fact predominate over questions affecting individual members and that a class action is a superior method for fairly and efficiently adjudicating the action. *See* FED. R. CIV. P. 23(b)(1)–(3).

Plaintiffs seek certification under Rule 23(b)(2). *See* ECF 94 at 45. In *Dukes*, the Court explained that "[t]he key to the (b)(2) is the indivisible nature of the injunctive or declaratory remedy warranted—the notion that the conduct is such that it can be enjoined or declared unlawful only as to all of the class members or as to none of them." 564 U.S. at 360 (citation omitted). Rule 23(b)(2) certification is available if three requirements are met: (1) "class members must have been harmed in essentially the same way"; (2) "injunctive relief must predominate over monetary damage claims"; and (3) "the injunctive relief sought must be specific." *Maldonado v. Ochsner Clinic Found*, 493 F.3d 521, 524 (5th Cir. 2007); *see also Perry*, 675 F.3d at 845. The specificity element requires plaintiffs to "give content" to the injunctive relief they seek "so that 'final injunctive relief may be crafted to describe in reasonable detail the acts required.'"

Perry, 675 F.3d at 848 (quoting *Shook v. Bd. of Cty. Comm'rs of Cty of El Paso*, 543 F.3d 597, 605 – 06 (10th Cir. 2008)).

Plaintiffs do not explicitly detail the injunctive relief they seek in their motion. They generally contend that Defendants have a "policy and practice of refusing adequate COVID-19 protections." ECF 94 at 45. But they do not complain of any specific inadequacies, nor do they propose solutions that *would*, in their opinion, be adequate. Plaintiffs assert that their proposed injunction—which they never actually propose in their motion—is sufficiently specific because "it would be tethered to an objective set of practices and procedures at the Pack Unit and an existing framework of guidelines authored by the CDC, and would not be abstract." ECF 94 at 45-46. But Plaintiffs do not propose a specific set of practices and procedures. Additionally, Plaintiffs do not specifically allege how Policy B-14.52 differs from CDC guidelines, and they propose no specific injunctive relief that would, in their opinion, bring Policy B-14.52 into conformance with CDC guidelines.

Also entirely lacking in specificity is Plaintiffs' proposed class period. They propose a class period from present until "protections against COVID-19 are no longer necessary." ECF 94 at 25. Plaintiffs offer no insight into when protections against COVID-19 might no longer be necessary. Nor do they suggest who might be responsible for determining when COVID-19 protections are no longer necessary. Do the Plaintiffs believe *they* should determine when COVID-19 protections are no longer necessary? Alternatively, do Plaintiffs propose that the Court make that determination? If so, what guidelines should be used to make that determination? Simply put, Plaintiffs have not identified with any specificity the injunctive measures they seek. Moreover, they have proposed a potentially indefinite class period. In other words, Plaintiffs have failed to

"give content" to the relief they seek, making reasonably detailed injunctive relief impossible. *See Perry*, 675 F.3d at 848. Since Plaintiffs do not seek specific injunctive relief, they have failed to meet Rule 23(b)(2)'s requirements, and certification is improper. *See Maldonado*, 493 F.3d at 524; *Perry*, 675 F.3d at 845.

V. CONCLUSION

Plaintiffs lack standing to represent a class because they did not exhaust their available administrative remedies prior to filing suit. Moreover, Plaintiffs fail to meet the requirements of Rules 23(a) and 23(b). The Court should therefore deny Plaintiffs' motion for class certification and permit this case to proceed only on Plaintiffs' individual claims.

Respectfully submitted.

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ATTORNEY FOR TDCJ DEFENDANTS

CERTIFICATE OF SERVICE

I, CHRISTIN COBE VASQUEZ, Assistant Attorney General of Texas, certify that a true and correct copy of the above and foregoing ***Defendants' Response in Opposition to Plaintiffs' Emergency Motion for Class Certification*** has been served electronically upon all counsel of record *via* the electronic filing system of the Southern District of Texas, on June 3, 2020.

/ s/ Christin Cobe Vasquez
CHRISTIN COBE VASQUEZ
Assistant Attorney General

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

LADDY CURTIS VALENTINE and RICHARD ELVIN KING, individually and on behalf of those similarly situated, Plaintiffs,	§	
v.	§	Civil Action No. 4:20-cv-01115
BRYAN COLLIER, in his official capacity, ROBERT HERRERA, in his official capacity, And TEXAS DEPARTMENT OF CRIMINAL JUSTICE, Defendants.	§	

DEFENDANTS' RESPONSE IN OPPOSITION TO PLAINTIFFS' EMERGENCY MOTION FOR CLASS CERTIFICATION

Exhibit 1

AFFIDAVIT

THE STATE OF **TEXAS** §

COUNTY OF **WALKER** §

BEFORE ME, the undersigned authority, on this day personally appeared Frances Gattis, who, being by me duly sworn, deposed as follows:

My name is Frances Gattis, and I am a Deputy Division Director of the Administrative Review and Risk Management Division of the Texas Department of Criminal Justice (TDCJ), a governmental agency. My duties include overseeing the management of the Offender Grievance department. I am executing this affidavit as part of my assigned duties and responsibilities. I am over 21 years of age, of sound mind, capable of making this affidavit, and personally acquainted with the facts herein stated.

The Texas Department of Criminal Justice stores information about offender grievances in its mainframe database. The entries of such records are made and stored as a regularly conducted activity and regular practice of the TDCJ, and were made at or near the time of the occurrence of the matters set forth by, or from information transmitted by, a person with knowledge of those matters.

I have searched, or have caused a search to be conducted, for grievances filed by offender Laddy Valentine, TDCJ #01782033.

Laddy Valentine has filed one (1) grievance during the past three years (note: records retention for grievances is only three years), and it was filed on April 1, 2020. Attached is a true and correct copy of said grievance and related investigative documents.

I declare under penalty of perjury that the foregoing is true and correct.

"Further Affiant sayeth not."

Frances Gattis

Frances Gattis
Deputy Division Director
Administrative Review and Risk Management
Texas Department of Criminal Justice

SWORN TO AND SUBSCRIBED BEFORE ME, the undersigned notary public, on the 1st day of May 2020.

Kelly E. Marmon

NOTARY PUBLIC, STATE OF TEXAS

KELLY E. MARMON
Notary Public, State of Texas
Comm. Expires 05-03-2021
Notary ID 10841468

Kelly E. Marmon
Notary's Printed Name

My Commission Expires:
May 3, 2021

(EMERGENCY GRIEVANCE)

Texas Department of Criminal Justice

STEP 1 OFFENDER GRIEVANCE FORM

OFFICE USE ONLY

Grievance #: 2020098479
Date Received: APR 07 2020
Date Due: 5/11/20
Grievance Code: 503
Investigator ID #: T21047
Extension Date:
Date Retd to Offender: APR 22 2020

Offender Name: Laddy C. Valentine TDCJ # 1782033
Unit: PAC Unit Housing Assignment: D 14-6
Unit where incident occurred: PAC Unit, 2400 Wallace Pack Rd. Navasota TX 77868

You must try to resolve your problem with a staff member before you submit a formal complaint. The only exception is when appealing the results of a disciplinary hearing.

Who did you talk to (name, title)? Submitted I-60 To Mr Selby/Unit Safety When? 27 Mar 20
What was their response? No response as of this date.
What action was taken? N/A

State your grievance in the space provided. Please state who, what, when, where and the disciplinary case number if appropriate

On 27 March 20, I submitted to Unit Safety Officer, Mr. Selby, an attempt to informally resolve the lack of hand sanitizing solutions for individual use within the Dormitory as well as additional cleaning supplies for individual cubicles. It has been five days and the issue remains unresolved. I am therefore, filing an emergency grievance, Step 1, for hand sanitization supplies, gloves, masks and additional cleaning supplies such as bleach and ammonia based cleaners, to be issued individually for prevention and suppression of contagions, specifically COVID-19.

I-127 Front (Revised 11-2010) YOUR SIGNATURE IS REQUIRED ON BACK OF THIS FORM (OVER)

Action Requested to resolve your Complaint. Immediate issue of personal hand sanitizers, additional cleaning supplies for community areas and personal cubicles.

Offender Signature: [signature] Date: 31 March 2020

Grievance Response:

Your grievance has been received and investigated. The Wallace Pack Unit is following all necessary precautions to help minimize the exposure to COVID-19. Staff is following all guidelines The Wallace Pack Unit has designated protocols to keep staff and offenders safe during this time. The Wallace Pack Unit is promoting social distancing on the recreation yards, dayrooms, hallways, and showers when possible. All staff and incoming offenders have their temperatures taken prior to entering the facility. Hand sanitizer is only necessary if soap is not available and the Wallace Pack Unit has an ample supply of soap. The Wallace Pack Unit also began issuing cloth mask to offenders on 4/14/20 and as of 4/15/20 all offenders on the Wallace Pack Unit received a cloth mask. No further action warranted at this time.

Signature Authority: [signature] Date: 4/22/20

If you are dissatisfied with the Step 1 response, you may submit a Step 2 (I-128) to the Unit Grievance Investigator within 15 days from the date of the Step 1 response. State the reason for appeal on the Step 2 Form.

Returned because: *Resubmit this form when the corrections are made.

- ☐ 1. Grievable time period has expired.
- ☐ 2. Submission in excess of 1 every 7 days. *
- ☐ 3. Originals not submitted. *
- ☐ 4. Inappropriate/Excessive attachments. *
- ☐ 5. No documented attempt at informal resolution. *
- ☐ 6. No requested relief is stated. *
- ☐ 7. Malicious use of vulgar, indecent, or physically threatening language. *
- ☐ 8. The issue presented is not grievable.
- ☐ 9. Redundant, Refer to grievance #_____
- ☐ 10. Illegible/Incomprehensible. *
- ☐ 11. Inappropriate. *

UGI Printed Name/Signature: _____

Application of the screening criteria for this grievance is not expected to adversely Affect the offender's health.

Medical Signature Authority: _____

OFFICE USE ONLY

Initial Submission UGI Initials:_____

Grievance #: _____

Screening Criteria Used: _____

Date Recd from Offender: _____

Date Returned to Offender: _____

2nd Submission UGI Initials:_____

Grievance #: _____

Screening Criteria Used: _____

Date Recd from Offender: _____

Date Returned to Offender: _____

3rd Submission UGI Initials:_____

Grievance #: _____

Screening Criteria Used: _____

Date Recd from Offender: _____

Date Returned to Offender: _____

I-127 Back (Revised 11-2010)