IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF PENNSYLVANIA

INMATES OF THE NORTHUMBERLAND COUNTY PRISON, et al.,	:	No. 08-cv-345
Plaintiffs,	:	
v.	:	Judge John E. Jones III
RALPH REISH, et al.,	:	
Defendants.	:	

MEMORANDUM AND ORDER

March 17, 2009

Pending before the Court are three motions filed by the parties in the above captioned case. First is a Motion to Dismiss filed by the Defendants, (Rec Doc. 33), which was amended through the filing of document 34.[1] Second is Plaintiffs' Motion to Supplement the Complaint, (Rec. Doc. 64), which was subsequently amended through the filing of document 70.[2] Third and finally is Plaintiffs' Second Motion for Class Certification ("Motion to Certify").[3] (Rec. Doc. 68). For

[1] We will refer to these documents collectively as the "Motion to Dismiss."

[2] We will refer to these documents collectively as the "Motion to Supplement."

[3] Plaintiffs' first Motion for Class Certification was denied by Order of June 11, 2008. (Rec. Doc. 61).

the reasons that follow we will grant in part and deny in part the Motion to Dismiss, grant the Motion to Supplement, and grant in part and deny in part the Motion to Certify.

I. PROCEDURAL HISTORY:

This suit was initiated by the filing of a Complaint by 12 current or former inmates at Northumberland County Prison ("NCP") against the County of Northumberland and individuals involved with the operation of the NCP.[4] (See Compl.). The Complaint's introduction characterizes the actions as follows:

> Inmates of the Northumberland County Prison bring this Section 1983 class action to challenge conditions and practices that are undermining their constitutional rights. Grounding their claims on the First, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution, they seek declaratory and injunctive relief to remedy systemic defects in the Prison's delivery of medical, mental health and dental care; life-threatening fire hazards in the institution's housing units; chronic environmental problems in the living and kitchen areas; the hostile

[4] The named inmates are: Scott Collins ("Collins"); Roman Brady ("Brady"); Jeremy Elsesser ("Elsesser"), Conrad Corely ("Corely"); Michael Wetzel ("Wetzel"); Hasson Lindsey "Lindsey"); Thomas Anderson "Anderson"); Joseph Bowers ("Bowers"); Sharon Reichner ("Reichner"); Megan Holohan ("Holohan"); Kelcie Williams ("Williams"); and Sonya Wyland ("Wyland") (collectively, "Plaintiffs"). (Rec. Doc. 1). However, it is important to note that three Plaintiffs, Corely, Anderson, and Holohan, were no longer incarcerated at NCP when the Complaint was filed.

The named Defendants are Ralph M. Reish ("Reish"), in his official capacity as Warden of NCP; Northumberland County, Pennsylvania ("Northumberland"); and the following individuals in their official capacities as members of the NCP Board (the "Board"): Frank Sawicki ("Sawicki"), Vinny Clausi ("Clausi"), Kurt Masser ("Masser"), Anthony Rosini ("Rosini"), Charles Erdman ("Erdman"), Robert Sacavage ("Sacavage"), and Chad Reiner ("Reiner"). (See id.). These entities will be collectively referred to as "Defendants."

> effects of profound overcrowding in the Women's Dormitory; the use of protracted bunk-restriction as a form of discipline in the Women's Dormitory and policies associated with that abusive practice; medieval-like conditions and practices in the Prison's basement cells; callous practices associated with the use of four-point physical restraints; the unequal, discriminatory treatment of female prisoners in the contexts of outdoor exercise, work release, and other institutional programs; the policy-based failure to provide incoming inmates with essential clothing supplies; and the lack of a confidential area for inmate consultations with their attorneys.

Id. at 2.

On March 12, 2008, Plaintiffs filed the their first Motion to Certify. (Rec. Doc. 9).[5] On June 11, 2008, we entered an Order denying that motion without prejudice to re-file same no later than September 15, 2008. (Rec. Doc. 61). Through that Order, we noted that although the scope of discovery from that point forward would not be limited to class certification issues per se, all fact discovery as to the issue of class certification was to be concluded by September 1, 2008. (See id.). On April 24, 2008, Defendants filed the Motion to Dismiss. (Rec. Doc. 34). On September 15, 2008, Plaintiffs filed a second Motion for Class Certification. (Rec. Doc. 68). On September 18, 2008, Plaintiffs filed their Motion to Supplement. (Rec. Doc. 70). Having been fully briefed, these Motions are ripe

[5] Within this factual chronology, it is important to note that on March 13, 2008, Plaintiff Wyland was transferred from NCP to Snyder County Prison ("SCP"), and on April 7, 2008, Plaintiff Collins was transferred from NCP to the State Correctional Facility at Camp Hill, Pennsylvania ("SCI-Camp Hill"). (Rec. Doc. 39 p. 16).

for disposition. We will address these motions, as well as the law and facts relevant thereto, in the below discussion.

II. DISCUSSION:

A. Motion to Dismiss

The Defendants seek the dismissal of Plaintiffs Corely, Anderson, and Holohan on standing grounds and of Plaintiffs Collins and Wyland on the basis of mootness. In their brief in opposition, Plaintiffs concede that Corely, Anderson, and Holohan lack the requisite standing to proceed as Plaintiffs in this case. However, Plaintiffs do contest the assertion that the claims of Collins and Wyland are mooted.[6] Accordingly, we will grant the Motion to Dismiss with regard to Plaintiffs Corely, Anderson, and Holohan. We will limit the present inquiry to the mootness issue surrounding Plaintiffs Collins, Wyland, and Wetzel.

At the outset, we should distinguish between the concept of "standing" and "mootness." "[Standing] inquires whether someone is the proper party to bring a law suit at the beginning of the case. Doctrinally, to satisfy core Article III requirements, standing requires (1) that the plaintiff suffer injury in fact, (2) that the injury be fairly traceable to the challenged conduct, and (3) that a favorable

[6] Additionally, although they do not assert same in their Motion to Dismiss, in their brief in opposition to the Motion to Certify, Defendants allege that the claims of Plaintiff Michael Wetzel are also mooted due to his transfer from NCP on May 13, 2008. (Rec. Doc. 92 p. 28). Therefore, we will include Wetzel in our mootness analysis.

ruling would redress the injury." See Lujan v. Defendants of Wildlife, 504 U.S. 555, 560-61 (1992). Mootness, on the other hand, asks whether a party who has established standing has now lost it because the facts of her case have changed over time." Artway v. Attorney Gen. of New Jersey, 81 F.3d 1235, 1246 (3d Cir. 1996)). "An action becomes moot when '(1) there is no reasonable expectation that the alleged events will recur . . . and (2) interim relief or events have completely eradicated the effects of the violation.'" Id., at 1246 (internal citations omitted). Pursuant to Artway, Defendants urge that Collins',Wyland's, and Wetzel's claims are moot because: (1) they are no longer inmates at NCP, having been transferred on April 7, 2008, March 13, 2008, and May 13, 2008, respectively; and (2) there is no indication that the alleged constitutional violations will ever recur, since there is no indication that those Plaintiffs will ever be re-transferred to NCP.

However, the Third Circuit Court of Appeals has recognized, "A plaintiff who brings a class action presents two separate issues for judicial resolution. One is the claim on the merits; the other is the claim that he is entitled to represent a class." Rosetti v. Shalala, 12 F.3d 1216, 1226 n.23 (3d Cir. 1993) (referring to the claim on the merits as the "substantive" or "personal" claim and to the entitlement to represent a class as the "procedural" claim). Plaintiffs note that there is an

exception to the mootness doctrine applicable to putative class action cases involving claims that are "inherently transitory," Rosetti, 12 F.3d at 1228 n.25, because such claims will often be mooted before a district court rules on a motion for class certification, County of Riverside v. McLaughlin, 500 U.S. 44, 52 (1991). In cases where a class representative's claim is mooted after the filing of the class certification but before the resolution of same, the class certification "relates back" to the complaint to preserve the merits of the case for judicial resolution provided that the claims of other class members are still viable.[7] See id.; see also Gerstein v. Pugh, 420 U.S. 103, 111 n.11 (stating that "in this case the constant existence of a class of persons suffering the deprivation is certain . . . and we can safely assume that . . . [other plaintiffs have] a continuing live interest in the case). Consequently, Plaintiffs assert that the "relation back" doctrine prevents the claims of Collins, Wyland, and Wetzel from being mooted, for class representation purposes, because the class certification was filed prior to the transfers of those Plaintiffs.

Quite simply, both positions are correct. As Defendants note, the substantive claims of the Plaintiffs are mooted because they are no longer inmates

[7] "By relating class certification back to the filing of a class complaint, the class representative would retain standing to litigate class certification though his individual claim is moot." Weiss v. Regal Collections, 385 F.3d 337, 347 (3d Cir. 2004).

at NCP and because they have not averred, in their Complaint or Opposition Brief, that they are likely to return to NCP. To the extent that Plaintiffs claim that the substantive claims of Collins, Wyland, and Wetzel qualify for the "capable of repetition, but evading review" exception to the mootness doctrine, this position is incorrect. To qualify for this exception, "two elements must be present: (1) the challenged action was in its duration too short to be fully litigated prior to its cessation or expiration, and (2) there was a reasonable expectation that the same complaining party would be subjected to the same action again." Praxis Prop., Inc. v. Colonial Sav. Bank, 947 F.2d 49, 61 (3d Cir. 1991) (citing Murphy v. Hunt, 455 U.S. 478, 482, (1982) (quoting Weinstein v. Bradford, 423 U.S. 147, 149 (1975))). As we have stated, Plaintiffs have not averred, nor can we infer, that there exists a reasonable expectation that Plaintiffs Collins, Wyland, and Wetzel would be forced to suffer the same alleged constitutional violations at NCP in the future.[8]

However, as Plaintiffs note, the loss of Collins', Wyland's, and Wetzel's substantive claims does not necessarily entail a loss of their procedural claim to

[8] When the issue of future repetition is insufficiently concrete, courts have refused to infer, based on speculation alone, that there is a reasonable expectation that the named plaintiffs would suffer the same harm in the future. See Zimmerman v. Schaeffer, 2008 WL 682491 *5 (M.D. Pa 2008). The issue sub judice is insufficiently concrete because there is nothing more than mere speculation regarding Plaintiffs Collins', Wyland's, and Wetzel's possible future return to NCP. We therefore conclude that the claims of those individuals do not qualify for the "capable of repetition, but evading review" exception. We will grant the Motion to Dismiss to the extent it seeks dismissal of the substantive claims of Collins and Wyland.

represent the putative class. As we have noted, in cases where a putative class representative's claim is mooted after the filing of the class certification but before the resolution of same, the class certification "relates back" to the complaint to preserve the merits of the case for judicial resolution provided that the claims of other class members are still viable. See McLaughlin, 500 U.S. at 52; Gerstein, 420 U.S. at 111 n.11. Here, the substantive claims of Collins, Wyland, and Wetzel were mooted the day they were transferred from NCP, April 7, 2008, March 13, 2008, and May 13, 2008, respectively. The class certification was filed on March 12, 2008. Therefore, those Plaintiffs could properly utilize the relation back doctrine to preserve their procedural claims provided that members of the putative class possess viable claims. As we will discuss below, some of the named Plaintiffs are still incarcerated at NCP, meaning that their claims are facially viable.[9] Accordingly, we will permit the certification to relate back to the Complaint, thereby allowing Plaintiffs Collins, Wyland, and Wetzel to remain class representatives. We will deny the Motion to Dismiss to this extent.

B. Motion to Supplement the Complaint

While conducting fact discovery pertaining to class certification, Plaintiffs'

[9] Indeed, Defendants Motion to Dismiss does not target all named Plaintiffs, implying that the unnamed Plaintiffs can maintain viable claims, as asserted in the Complaint. We believe this inference to be logical and can find nothing in the pleadings or the briefs to the contrary.

counsel obtained information indicating that during the summer of 2008, it became a widespread practice at NCP to confine three inmates to a cell designed to house only two inmates, a procedure that will heretofore be referred to as "triple celling." (Rec. Doc. 71 p. 3). Plaintiffs believe that the triple celling violated their Eighth and Fourteenth Amendment rights and seek to supplement their original complaint, pursuant to Federal Rule of Civil Procedure 15(d), to include this allegation. (Id.). Additionally, Plaintiffs seek to add as a named Plaintiff Dale Foss, a current inmate at NCP who has allegedly endured triple celling and other constitutional violations as recounted in the original Complaint. (Id. p. 7).

Defendants oppose the Motion to Supplement on two grounds. First, they argue that it fails to comply with Local Rule 15.1, which outlines the procedure for amending a pleading. See M.D. Pa. L.R. 15.1. In particular, Defendants aver that the following acts are in contravention to the local rules: (1) Plaintiffs' failure to attach a proposed complaint as an exhibit to their motion; (2) Plaintiffs' failure to attach a supplemental complaint that is complete in itself, without any reference to the initial Complaint; and (3) Plaintiff's failure to attach a proposed supplemental Complaint highlighting the proposed additional averments. (Rec. Doc. 81 p. 9). Defendants assert that Plaintiffs' failure to abide by the local rules in these regards should result in the denial of the Motion to Supplement. We do not agree.

Local rule 15.1 is entitled "Amended Pleadings." See M.D. Pa. L.R. 15.1. As Plaintiffs' note, there is distinction between *amending* a pleading and *supplementing* a pleading. *Amending* a pleading involves *entirely replacing the earlier pleading* with a new pleading containing matters that occurred *prior* to the filing of the original pleading, while *supplementing* a pleading involves *merely adding* to the original pleading events occurring *subsequent* to the earlier pleading. 6A CHARLES ALAN WRIGHT & ARTHUR R. MILLER, FEDERAL PRACTICE AND PROCEDURE § 1504 (3d ed. 2004) (emphasis added). The Local Rules provide no express mandate with respect to supplementing a pleading, giving rise to the inference that the dictates of Local Rule 15.1 apply with equal force to *amended* and *supplemented* pleadings. However, we believe that the semantics recounted above cast a sufficient cloud over the rule such that a denial of the instant motion on this ground alone would be inequitable.[10]

Defendants' second argument for the denial of the Motion to Supplement is substantive in nature and focuses on the futility of the contemplated amendment.

[10] This conclusion is not only driven by our determination that the local rules are somewhat unclear with respect to the procedure for supplementing a pleading, but also by our stark realization that denying the Motion to Supplement on this ground is tantamount to punishing the Plaintiffs for an arguably reasonable failure on the part of their counsel. We are not prepared to conclude that Plaintiffs' counsel violated local rule 15.1, nor that the sanction for same, if it occurred, should ultimately be absorbed by the Plaintiffs themselves. We therefore decline to deny the Motion to Supplement on the basis that it does not comply with the local rules.

See Foman v. Davis, 371 U.S. 178, 182 (1962) (holding that a district court may deny supplementation when allowing same would be futile); see also Young v. Beard, 2008 WL 2693859 (W.D. Pa. 2008). In that regard, the standard for supplementation under Rule 15(d) is "essentially the same" as the standard for amending under Rule 15(a). Medeva Pharm. Ltd. V. Am. Home Prods. Corp., 201 F.R.D. 103, 104 n.3 (D. De. 2001) (citing Epstein v. Township of Whitehall, 1989 WL 1745118 *2 (E.D. Pa. 1989)). The amendment of a complaint is futile if it, inter alia, cannot survive a motion to dismiss for failure to state a claim, Jabolinski v. Pan Am. World airways, Inc., 863 F.2d 289, 292 (3d Cir. 1988) (internal citations omitted). Therefore, Defendants urge that the supplementation is futile because it cannot survive a motion to dismiss. It is therefore important to take cognizance of the standard for analyzing such a motion.[11]

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[11] In considering a motion to dismiss for failure to state a claim under Rule 12(b)(6), courts "accept all factual allegations as true, construe the complaint in the light most favorable to the plaintiff, and determine whether, under any reasonable reading of the complaint, the plaintiff may be entitled to relief." Phillips v. County of Allegheny, 515 F.3d 224, 231 (3d Cir. 2008) (quoting Pinker v. Roche Holdings Ltd., 292 F.3d 361, 374 n.7 (3d Cir. 2002)). In resolving a motion to dismiss pursuant to Rule 12(b)(6), a court generally should consider "only the allegations in the complaint, exhibits attached to the complaint, matters of public record, and documents that form the basis of a claim." Lum v. Bank of America, 361 F.3d 217, 222 (3d Cir. 2004).

A Rule 12(b)(6) motion tests the sufficiency of the complaint against the pleading requirements of Rule 8(a). Rule 8(a)(2) requires that a complaint contain a short and plain statement of the claim showing that the pleader is entitled to relief, "in order to give the defendant fair notice of what the claim is and the grounds upon which it rests." Bell Atl. Corp. v. Twombly, --- U.S. ----, 127 S. Ct. 1955, 1964 (2007) (quoting Conley v. Gibson, 355 U.S. 41, 47 (1957)). "While a complaint attacked by a Rule 12(b)(6) motion to dismiss does not need

Plaintiffs' Motion to Supplement seeks to add to the original Complaint Eighth and Fourteenth Amendment claims arising from the triple celling at NCP in the summer of 2008. The Eighth Amendment claim would only be applicable to *convicted inmates* who were triple celled, while the Fourteenth Amendment only applies to *pretrial detainees* who were triple celled. See Hubbard v. Taylor, 399 F.3d 150, 167 n.23 (3d Cir. 2005) (there is a "distinction between pretrial detainees' protection from 'punishment' under the Fourteenth Amendment, on the one hand, and convicted inmates' protection from punishment that is 'cruel and unusual' under the Eighth Amendment, on the other") (referred to herein as "Hubbard I"). The Third Circuit Court of Appeals has established that "pretrial detainees . . . are entitled to at least as much protection as convicted prisoners, so

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detailed factual allegations, a plaintiff's obligation to provide the grounds of his entitlement to relief requires more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do." Id. at 1965. A plaintiff must make "a 'showing' rather than a blanket assertion of an entitlement to relief", and "without some factual allegation in the complaint, a claimant cannot satisfy the requirement that he or she provide not only 'fair notice,' but also the 'grounds' on which the claim rests." Phillips, 515 F.3d at 232 (citing Twombly, 127 S. Ct. at 1965 n. 3). "[A] complaint must allege facts suggestive of [the proscribed] conduct, and the "[f]actual allegations must be enough to raise a right to relief above the speculative level." Twombly, 127 S. Ct. at 1965, 1969 n.8. Therefore, "stating a claim requires a complaint with enough factual matter (taken as true) to suggest the required element." Phillips, 515 F.3d at 234 (quoting Twombly, 127 S. Ct. at 1965 n. 3).

On the other hand, "a complaint may not be dismissed merely because it appears unlikely that the plaintiff can prove those facts or will ultimately prevail on the merits." Id. at 231 (citing Twombly, 127 S. Ct. 1964-65, 1969 n.8). Rule 8 "does not impose a probability requirement at the pleading stage, but instead simply calls for enough facts to raise a reasonable expectation that discovery will reveal evidence of the necessary element." Id. at 234.

the protections of the Eighth Amendment would seem to establish a floor of sorts." Fuentes v. Wagner, 206 F.3d 335, 344 (3d Cir. 2000) (quoting Kost v. Kozakiewicz, 1 F.3d 176, 188 n.10 (3d Cir. 1993)). Accordingly, we will begin our analysis with Plaintiffs' Eighth Amendment claim.

1. Eighth Amendment Claim

The Eighth Amendment of the United States Constitution proscribes cruel and unusual punishment. See U.S. CONST. amend. VIII. To state an Eighth Amendment claim, an inmate must allege both objective and subjective components. See Wilson v. Seiter, 501 U.S. 294, 298 (1991). The objective component requires that an inmate allege "deprivations denying 'the minimal civilized measure of life's necessities'" Id. (quoting Rhodes v. Chapman, 452 U.S. 337, 346 (1981)).[12] "The subjective component requires that the state actor have acted with 'deliberate indifference.'" Id. (citing Farmer v. Brennan, 511 U.S. 825, 835 (1994)). The proper analysis for deliberate indifference is whether a prison official "acted or failed to act despite his knowledge [that] a substantial risk of

[12] "The Eighth Amendment does not give the court authority to impose its own 'notions of enlightened policy.'" Tillery v. Owens, 907 F.2d 418, 426 (3d Cir. 1990) (quoting Hassine v. Jeffes, 846 F.2d 169, 175 (3d Cir. 1988)). "Thus, deficiencies and inadequacies in prison conditions do not necessarily violate the Eighth Amendment. The amendment is violated only where an inmate is deprived of 'the minimal civilized measure of life's necessities.'" Id. (quoting Rhodes, 452 U.S. at 347.

serious harm" would befall an inmate. Farmer, 511 U.S. at 841.

In determining whether the conditions of an inmate's confinement violate the objective component of the Eighth Amendment inquiry, courts must look to the "totality of the conditions" within the prison. See Tillery, 907 F.2d at 426. In considering double or triple celling in particular, relevant considerations include: length of confinement; the amount of time prisoners must spend in their cells daily; opportunities for activities outside their cells; the repair and functioning of basic facilities like plumbing, ventilation, and showers; control of vermin; lighting; heating; noise level; bedding; safety and security; medical care; and sanitation. See id. at 426-27 (citing Union County Jail Inmates v. Di Buono, 713 F.2d 984, 1000-01(3d Cir. 1983) (discussing Eighth Amendment claims of convicted inmates)); Peterkin v. Jeffes, 855 F.2d 1021, 1025-26 (3d Cir. 1988) (internal citations omitted). Courts have found double and triple celling permissible when the general prison conditions were otherwise adequate. See id at 427-28 (noting cases standing for this proposition).

In their initial Complaint and the appendix to their Motion to Certify, the Plaintiffs have alleged that the triple celling at NCP exacerbate the following deficiencies: poor ventilation, extreme seasonal temperatures, regular vermin infestation, fire hazards, and access to physical and psychological medical care.

See generally (Rec. Docs. 1, 73). Additionally, Plaintiffs aver that they are confined in their triple cells for 23 hours per day and insinuate that they are subjected to triple celling for a significant number of days. (See Suppl. Compl. ¶¶ 6, 8, 10). Taking these allegations in the light most favorable to Plaintiffs, as we must, we believe that a reasonable jury could conclude that the averments in the Complaint and the Supplemental Complaint rise to a constitutional violation under the "totality of the conditions test" enunciated in Tillery. This satisfies the first prong of the Eighth Amendment inquiry. We must now look to the second prong and determine whether the Eighth Amendment violations occurred as a result of prison officials' deliberate indifference.

In their Reply Brief, Plaintiffs aver that in 2006 NCP had been cited by the Pennsylvania Department of Corrections ("DOC") for overcrowded conditions associated with triple celling. Therefore, we believe that a reasonable jury could infer that NCP officials knew that triple celling inmates in the conditions present at NCP was problematic because it was potentially harmful to inmates.[13] Since the original Complaint indicates that the majority of the originally Plaintiffs were confined at NCP since 2007, it can reasonably be inferred that the NCP's custom

[13] Indeed, Plaintiffs have alleged that the confluence of triple celling and inadequate conditions resulted in significant pain and suffering. (Suppl. Compl. ¶ 8).

of triple celling inmates in inadequate conditions persisted in spite of DOC's admonition. Therefore, we believe that a reasonable jury could infer that the NCP officials continued to triple cell inmates at NCP even after the officials became aware that triple celling was potentially harmful. This is the gravamen of deliberate indifference.[14] Accordingly, the Plaintiff's triple celling claim based in the Eighth Amendment can withstand a motion to dismiss and therefore is not futile. However, futility is not the only factor to be considered when entertaining a motion to supplement.

The granting of a motion to supplement a complaint is within the sound discretion of the court, and, before we can permit Plaintiffs to supplement the Complaint with their proposed Eighth Amendment claim, we must consider the following additional factors: the extent to which supplementation will provide a justiciable disposition of the case; inconvenience to the Plaintiffs in disallowing supplementation; and the extent to which supplementation will prejudice the parties. Nottingham v. Peoria, 709 F. Supp. 542, 544 (M.D. Pa. 1988) (enumerating factors to be considered when entertaining a Rule 15(d) motion).

To this end, Defendants have identified no appreciable prejudice to them

[14] Again, the proper analysis for deliberate indifference is whether a prison official "acted or failed to act despite his knowledge [that] a substantial risk of serious harm" would befall an inmate. Farmer, 511 U.S. at 841.

that would be occasioned by the granting of the Motion to Supplement, nor can we perceive any, since the supplementation involves claims directly related to previously identified issues and would not add new Defendants to the litigation. Further, permitting supplementation will increase judicial efficiency since it will allow us to consider all claims stemming from the same factual nexus in one judicial proceeding, therefore obviating the need for Plaintiffs to assert the claims sought to supplemented through the filing of a new complaint docketed under a new civil case number. In this sense, supplementation also avoids inconveniencing the Plaintiffs. Lastly we note that at the time the Motion to Supplement was filed in September of 2008, the parties had the luxury of approximately 6 months in which to conduct discovery on the potentially supplemented matters. We believe that this time frame would have been adequate to prevent any prejudice to the parties. Therefore, it is our conclusion that the Plaintiffs did not act in bad faith or with dilatory motives in filing the Motion to Supplement. Accordingly, we believe that the Rule 15(d) factors militate in favor of permitting Plaintiffs to supplement the complaint with their Eighth Amendment claim.[15] We will grant the Motion to supplement to this extent. We must now

[15] We do, however, note that the discovery cut-off date is rapidly approaching. In order to prevent prejudice to either party occasioned by the supplementation of the complaint and discovery engendered by it, we will schedule a conference to establish new case management dates in our accompanying order.

consider Plaintiffs' proposed supplementation of their proposed Fourteenth Amendment claim.

2. Fourteenth Amendment Claim

Defendants interpose a futility objection the Fourteenth Amendment claim identical to that articulated above, and so we embark upon a similar methodological framework. While the inquiry into the constitutionality of pre-trial confinement under the Fourteenth Amendment is similar to that of post-trial confinement of convicts under the Eighth Amendment, Silletti v. Ocean County Dept. of Corr., 2006 WL 2385124 *3 (D.N.J. 2006), the Third Circuit Court of Appeals has held that "pretrial detainees . . . are entitled to at least as much protection as convicted prisoners, so the protections of the Eighth Amendment would seem to establish a floor of sorts." Fuentes, 206 F.3d at 344 (quoting Kost , 1 F.3d at 188 n.10); see also City of Revere v. Mass. Gen. Hosp., 463 U.S. 239, 244 (1983). Since we have found that the conduct of the NCP officers violated the Eighth Amendment's prohibition, we could safely conclude that that conduct is also violative of the Fourteenth Amendment. However, in the spirit of completeness, we will briefly address the Fourteenth Amendment standards applicable to pre-trial detainees.

Pursuant to the Due Process Clause of the Fourteenth Amendment, "a pre-

trial detainee may not be punished prior to an adjudication of guilt." Bell v. Wolfish, 441 U.S. 520, 535 (1979). Consequently,

> [a] court must decide whether the disability is imposed for the purpose of punishment or whether it is but an incident of some other legitimate governmental purpose. Absent a showing of an expressed intent to punish on the part of the detention facility officials, that determination generally will turn on 'whether [the disability has] an alternative purpose . . . and whether it appears excessive in relation to [that] purpose.' . . . Thus, if a particular condition or restriction of pretrial detention is reasonably related to a legitimate governmental objective, it does not, without more, amount to 'punishment.' Conversely, is a restriction or condition is not reasonably related to a legitimate goal–if it is arbitrary or purposeless–a court permissibly may infer that the purpose of the governmental action is punishment that may not constitutionally be inflicted upon detainees *qua* detainees.

Id. at 538-39 (internal citations omitted). Therefore, the proper inquiries are "first, whether any legitimate purposes are served by [the] conditions [of pre-trial detention], and second, whether these conditions are rationally related to these purposes." Di Buono, 713 F.2d at 992 (discussing Fourteenth Amendment claims fo pre-trial detainees).

We are cognizant that there exists case law for the proposition that the legitimate governmental purpose served by triple celling pre-trial detainees is the effective and efficient maintenance of the prison in the face of overcrowded conditions. See id. at 993; see also Hubbard v. Taylor, 538 F.3d 229, 233 (3d Cir.

2008) (referred to herein as "Hubbard II"). Having established this, we consider whether the conditions of pre-trial confinement are rationally related to the stated governmental interest. This analysis involves an inquiry into whether "the adverse conditions become excessive in relation to the purposes assigned to them." Di Buono, 713 F.2d at 992 (quoting Bell, 441 U.S. at 542). "In conducting this excessiveness analysis, 'we do not assay separately each of the institutional practices, but [instead] look to the totality of the conditions.'" Hubbard II, 538 F.3d at 233 (quoting Hubbard I, 399 F.3d at 160 (quoting Jones v. Diamond, 636 F.2d 1364, 1368 (5th Cir. 1981))). The conditions relevant to the Fourteenth Amendment claims of pre-trial detainees are similar to those pertinent to the Eighth Amendment claims of convicted inmates. Compare Tillery, 907 F.2d at 426-27, with Hubbard II, 538 F.3d at 233 (citations omitted) .

In this vein, we again note that the Plaintiffs have alleged that the triple celling at NCP exacerbated the following deficiencies: poor ventilation, extreme seasonal temperatures, regular insect infestation, fire hazards, access to physical and psychological medical care. See generally (Rec. Docs. 1, 73). Since the officials at NCP were made aware of the pitfalls associated with triple celling in 2006 and continued to engage in that practice without remedying other conditions in the prison, we believe that a reasonable jury could infer that the triple celling, in

combination with the aforementioned conditions, was meant to punish the pre-trial detainees in as much as it was excessive in relation to the asserted governmental purpose of efficiently managing the prison.[16]

Accordingly, Plaintiffs' proposed triple celling claim grounded in the Fourteenth Amendment is not futile because it can survive a motion to dismiss. Further, for the reasons stated in our discussion of Plaintiffs' Eighth Amendment claim, we do not believe that their Fourteenth Amendment claim was brought in bad faith or with a dilatory motive, nor do we believe that supplementation of same will cause prejudice or undue delay. Therefore, we will grant the Motion to Supplement insofar is it seeks to add the aforementioned Fourteenth Amendment triple celling claim to the original Complaint.

3. Addition of Dale Foss as a Plaintiff

Finally, we must address the issue of adding Dale Foss as a Plaintiff in this action. We do not believe that permitting supplementation of the complaint in this

[16] We note that considerations such as triple celling "are peculiarly within the province and professional expertise of corrections officials, and, in the absence of substantial evidence in the record to indicate that the officials have exaggerated their response to these considerations, courts should ordinarily defer to their expert judgment." Bell, 441 U.S. at 540 n. 23. However, such deference is to be afforded *after* a record on the issue has been developed. Since such a record is not in place, and since we believe that the Plaintiffs have satisfied their pleading burden, it is our opinion that Plaintiffs should be afforded an opportunity to develop a record on the issue of triple celling. This determination does no violence to the deference mentioned in Bell.

regard will prejudice the parties or delay the proceedings for the aforestated reasons. Indeed, Defendants themselves have not suggested differently. We will therefore grant the Motion to Supplement to this extent as well. This determination results in the Motion to Supplement being granted in its entirety.

C. Motion to Certify Class

1. Factual Background

Plaintiffs' Motion to Certify seeks the certification of three discrete classes of NCP inmates. The "global class" consists of all current and future inmates of the NCP and "seeks to pursue claims associated with the provision of medical, dental and mental health care; environmental conditions in the housing units; fire hazards in the living areas; confinement in the Prison's basement; the use of four-point restraints; the distribution of essential clothing to inmates and the venue in which prisoners meet with their attorneys." (Br. Supp. p. 64 n. 15) (members of this class will be referred to as "global inmates" or "global plaintiffs"). One proposed sub-class (the "male sub-class") consists of all current and future male inmates of the NCP and seeks to challenge "a policy that denies segregated [male] prisoners outdoor recreation and requires them to be handcuffed and shackled when engaging in recreation." (Id. p. 64 n. 16) (members of this class will be referred to as "male inmates" or "male plaintiffs"). The other proposed sub-class

(the "female sub-class") consists of all current and future female inmates of NCP and challenges "the bunk-restriction policy that operates in the women's dormitory and alleged discrimination in the context of the institution's work release and recreation program." (Id.) (members of this class will be referred to as "female inmates" or "female plaintiffs").

At this juncture, it is important to note that the composition of each of the three proposed classes has changed since the inception of this litigation. The global and male classes have lost Plaintiffs Corely, Anderson, and Holohan, who have been dismissed for lack of standing. The global and female classes have lost Plaintiff Reichner, who has withdrawn from the litigation. Additionally, the substantive claims of Plaintiffs Collins, Wyland, and Wetzel have been mooted since they are no longer inmates at NCP,[17] Therefore, we must determine whether there remain class representatives from each proposed class with viable substantive claims. In that vein, it appears that Plaintiffs Brady, Elsesser, Lindsay, Bowers, and Williams have standing to pursue substantive claims against the Defendants. Therefore, Plaintiffs Brady, Elsesser, Lindsay, and Bower may properly represent the male sub-class, Plaintiff Williams may properly represent

[17] As we have noted, these plaintiffs may serve as class representatives provided that at least one member of the proposed classes has viable substantive claims.

the female sub-class, and all five of those Plaintiffs may represent the global class.[18] We will address the specific allegations of each proposed class *seriatim*.[19]

The global inmates begin by alleging systemic deficiencies in medical care at NCP. Plaintiffs note that there are typically 160-180 men and 20-30 women confined in the NCP on a monthly basis. (Br. Supp. Ex. T). At the time, the medical staff at NCP consisted of a single licensed practical nurse ("LPN") and a part-time physician.[20] (Id. Ex. MM). Nursing was available 8 hours a day on weekdays but was not available on weekends. (Id. Ex. V, p. 8). During the hours when a nurse was not present, guards were tasked with the duty of distributing prescribed medication to inmates. (Id. Ex. A, 26-27; B, p. 87-88; C, p. 72-73; S, p.4; G, p. 100-01; Q, p. 3; CC, p. 22-23). Further, while Doctor Robert Hynick ("Hynick") is under contract with Northumberland County, requiring him to make weekly visits to NCP for the purpose of treating inmates, said contract does not specify the number of hours he is to spend at the facility. (Id. Ex. HH, p. 2). Log

[18] Since there exist class members who possess viable substantive claims, Plaintiffs Collins and Wetzel may also serve as class representatives for the male sub-class, Plaintiff Wyland may serve as a representative for the female sub-class, and all three of these Plaintiffs may serve as representatives for the global class.

[19] All of the facts recited herein reflect conditions present at NCP at the time the Motion to Certify was briefed.

[20] Although the job description of the LPN indicates that she is to be supervised, Plaintiffs aver that there is no evidence that such supervision actually occurred.

books prepared by NCP's Shift Commander indicate that between January 1, 2006 and August 9, 2008, Hynick rarely visited the prison more than once a week and that his visitations often did not exceed an hour. (Id. Ex. S, pp. 10, 40-49).

In addition to the alleged dearth of medical attention at NCP, the global inmates assert that NCP does not maintain an infirmary or isolation cells for inmates with infectious diseases, even though it has been cited by the DOC for same. (See id. Ex. AA, 21-24). While NCP does contain rooms where infirm inmates are quarantined, global inmates allege that these cells are not modified for that purpose and are unfit for same. Global inmates conclude that these conditions deprive them of their constitutional rights.

The global inmates also take umbrage with the alleged deficiencies in mental health care at NCP. Despite the increase in the number of mentally ill inmates institutionalized at NCP, the global inmates assert that the mental health staff consisted of a part-time counselor and Dr. Frederick Maue, who retired in or around May 2008 and had not been replaced as of late September 2008. (Id. Ex. S, p. 12; T, p. 198). Plaintiffs aver that NCP does not have a psychiatric nurse or social worker on its staff. (See id. Ex. V, p.8; MM, p. 1). Further, Plaintiffs contend that NCP does not have a written policy concerning the provision of mental health care to inmates. (Id. Ex. Z, pp. 2, 4). Additionally, the counselor

was "to perform mental health evaluations of inmates who potentially need psychiatric evaluation" prior to these inmates being afforded access to Dr. Maue, the latter of which was extremely difficult to obtain. (Id. Ex. KK, p.1). Indeed, the supervisor logs indicate that Dr. Maue's appearances at NCP were sporadic and often very short in duration.[21] (See id. Ex. S, p. 11). The global inmates assert that counselor usually visited NCP three weekdays per week and was not available on weekends. (Id. Ex. H, p. 91-92). Finally, the global inmates assert that the NCP staff often refused to administer mental health medications to inmates, even when prescriptions were in place at the time of institutionalization. (See e.g., id. Ex. A (Plaintiff Williams); G (Plaintiff Elsessner)).

The global inmates also claim that there is a systematically inadequate access to dental care at NCP. They note that there appears to be no written policies, statements, rules, or regulations related specifically to the dental care of NCP prisoners. (Id. Ex. X, p, 11; Y, 3). Global inmates aver that during the two and half years encompassed by their review, NCP's contract dentist, Dr. Fricken, made only 40 documented trips, which amounts to an average of slightly more than one trip per month. (See id. Ex. S, p. 12-13, 57-59). At a 2007 Board

[21] Dr. Maue's contract merely required him to evaluate inmates "as soon as [his] schedule permits." (Id. Ex. JJ, p. 2).

meeting, Warden Reish allegedly stated that dental treatment was limited to "dental emergencies." (Id. Ex. T, p. 123).

The global inmates next claim that NCP's use of two basement segregation cells is unconstitutional. One cell (the "Dry Cell") allegedly has no toilet or sink and only a single, metal, mattress-less bed frame for sleeping purposes. (Id. Ex. H, p. 126-27; U, p17; V, p. 17). The other cell (the "Wet Cell") is equipped with a toilet, sink, and concrete slab, which functions as a bed. (Id. Ex. U, p. 17; V, p. 17). The wet cell also contains a window, which cannot be opened and lighting that always remains activated. (See id. Ex. B, p. 101; H, p. 133; V, p. 18). When confined in either cell, it is not atypical for inmates to be shackled with leg irons and/or handcuffs. (Id. Ex. U, p. 17-18; V, p. 18). When confined in the basement cells, male inmates are often stripped of their underclothes and female inmates are often stripped down to their underclothes. (See id. Ex. H, p. 130; U, p.17-18; V, p. 18). Temperatures in these cells reflect seasonal extremes, (id. Ex. H, p. 126-27; L, p.4-5; M, p. 4), and are exacerbated by the lack of ventilation in the summer and the lack of clothing or blankets in the winter, (id. Ex. L, p. 4-5). During their period of confinement, inmates are often prohibited from showering. (Id. Ex. L, p.4-5; M, p.4). Global inmates were confined in these conditions for multiple days, often approaching a week. (Id. Ex. C, p. 43-47). Global inmates have

adduced evidence that between January 2006 and August 2008 there were at least 202 commitments to the basement cells involving male and female prisoners. (Id. Ex. S, p. 6). Additionally, global inmates have produced evidence that it was not uncommon for multiple inmates to be confined to these cells simultaneously, the largest number of simultaneous commitments being 13. (Id. Ex. S, pp. 7-8).

The next condition attacked by the global inmates is the NCP's use of "four-point restraints."[22] Supervisor logs reveal at least 21 instances of four-pointing between January 2006 and August 2008 involving 18 different inmates of both genders. The logs also indicate that episodes of four-pointing sometimes spanned multiple days. (Id. Ex S, p. 9). The incidents of four-pointing often occurred in the NCP's basement cells under the conditions present therein, as recounted above. (Id.). The log books do not consistently indicate the reasons why each inmate was four-pointed, (id.), and therefore the global inmates argue that the legitimacy of imposing four-point restraints cannot be determined without a more intensive fact discovery.

Global inmates also complain about general environmental conditions at

[22] By all accounts, being placed in four-points restraints involves positioning the inmate on his or her back against a metal bed frame and shackling each of his or her limbs thereto. (Id. Ex. C, p.61, 63; N, p. 2). The inmate remains bound to the bed frame except when eating or relieving themselves. (Id. Ex. C, p. 58, 64; N, p. 2).

NCP. The first of these involves extreme seasonal temperatures. Global inmates of the male gender assert that their cells are intensely hot in the summer months and that this heat is exacerbated by the poor ventilation, the only modicum of which is provided by a small window in each cell that only opens a few inches. (Id. Ex. E, p. 63-65; F, p. 39, 51, 64). Global inmates of the female gender receive the benefit of box fans to circulate air throughout the female dormitory; however, residents thereof state that this is ineffective in combating the extreme heat, as it only serves to circulate hot air around the dormitory. (Id. Ex. H, p. 141-43; G, p. 38-39; O, p. 5). Inmates of both genders attest to the frigid conditions inside NCP during the winter months, which is exacerbated by cracks around the windows and Warden Reish's apparent refusal to adjust the heat. (Id. Ex. F, p. 63).[23]

The second environmental complaint involves vermin infestation. Global inmates aver that thriving populations of cockroaches, water bugs, centipedes, silverfish, spiders, flies, and ants are not uncommon at NCP. (Id. Ex. B, p. 47-49; C, p. 25-26, 50; E, p. 19-20; F, p. 19; G, p. 6; H, 58, 65-66; L, p.3; R, p. 4). Although NCP has a contract with the J.C. Ehrlich Company to exterminate the prison, the supervisor logs indicate that Ehrlich personnel have only entered NCP

[23] Inmate Wetzel indicates that inmates are provided with one wool blanket but that this cannot effectively combat the cold temperatures during the winter season. (See id. Ex. F, p. 52).

one time since January 2006, that being in February 2008, the month that the instant litigation commenced. (Id., Ex. S, p. 13).

The third environmental condition complained of is overcrowding. Global inmates of the male gender assert that they are being triple celled in cells that cannot reasonable accommodate three inmates. When three inmates are confined in a cell designed for two inmates, each of the three inmates is left with 20 square feet of unencumbered floor space. (Id. Ex. AA, p. 7). Hence, there is only enough space for one inmate to walk around at a time. (Id. Ex. L, p. 2). This type of confinement acutely affects inmates who are locked in their cells 23 hours per day. The female dormitory is similarly overcrowded, cramming upwards of 35 female inmates in space designed to house 28 female inmates. (Id. Ex. U, p. 16; V, p. 16).[24] Plaintiff Williams has testified that the beds are so close that "you go to bend over and you're sticking your butt in somebody's face." (Id. Ex. G, p. 52).[25]

[24] It appears as though the female dormitory consists of a large room in which 28 beds are placed. (See id. Ex. AA).

[25] Perhaps as an outgrowth of the overcrowding claim, global inmates contend that there is insufficient space in which to conduct confidential legal visits. (Id. Ex. E, p. 40). While some of these visits occur in the law library, they are often conducted in an unenclosed cubicle that is proximate to a well-traveled hallway, the Deputy Warden's office, and the staff kitchen. (Id. Ex. C, p. 10-13; G, p. 62-64, 77-79). The cubicle has partial walls and no door. (Id. Ex C, p. 10-13; G, p. 77-79). It is alleged that conversations between inmate and counsel can be readily overheard by passersby. (Id. Ex. C, p. 14-15, 81; G, p. 77-79). This allegedly hampers effective communication between client and counsel. (Id. Ex. C, P. 14-15).

Additionally, global inmates assert that NCP has systematically failed to repair various items in the prison, including a roof in the female dormitory, an approximately 20 square foot area of mold covering a wall in the female dormitory, recurring shortages of hot water lasting months at a time,[26] and the issuance of soiled and/or breached mattresses to incoming inmates. (Id. Ex. E, p. 25-32; G, p. 40-46, 105-06; H, pp. 60, 61, 85-86, 143; O, p. 6; Q, p. 4; R, p. 4).[27]

Finally, the global inmates complain about fire hazards at the NCP. They aver that the cell doors are padlocked, not controlled electronically, which necessitates the individual unlocking of each door manually. (See id. A, p. 75-76; C, p. 21; D, p. 50; U, p.12; V, p. 11). The global inmates further contend that once unlocked, many of the doors are difficult to open because they are poorly aligned with the cell gate and consequently stick thereto. (Id. Ex. F, p. 56-57). Global inmates assert that these conditions create a hazard in the event of a prison fire that necessitates a hasty exodus from the cells. They also aver that the fire

[26] Global inmates aver that NCP has been cited by the DOC for failing to provide sufficient shower facilities for its male inmates. (Id. Ex. AA, 7).

[27] Global inmates additionally contend that they were neither given nor offered underclothes when admitted to NCP and, therefore, were forced to wear the clothes they were admitted in for weeks. (Id. Ex. A, p. 9-11; B, p. 57-58; C, p. 82; D, p. 36; G, p. 58-60; H, p. 7-9). Further, global inmates aver that the *Inmate Handbook* does not contain a provision for issuance of underclothing, nor does NCP's *Admissions Policy* refer to same. (See generally id. Ex. EE, FF, GG).

hazard is compounded by the overcrowded conditions in the prison and by the fact that inmates must step over a hot water pipe (standing a foot and a half off the floor) in order to reach the fire exit, which can only be unlocked from the outside. (Id. Ex. B, p. 116-17; F, p. 34-38; U, p. 12-13; V, p. 12). Global inmates also allege that there are no fire sprinklers in the left or right wings, in the basement cells, or in the women's dormitory. (Id. Ex G, p. 101-02; H, p. 29; U, p. 13-14; V, p. 12). Further, they aver that inmates of both genders have ample access to flammable materials within the prison. (See e.g., id. Ex.C, 18-20; F, p. 37-38, 52; G, p 103).

In addition to these claims lodged by the global inmates, the sub-class of male inmates lodge complaints about the conditions of their segregation. While segregated, male inmates are allegedly shackled by their legs and handcuffed during their one hour of indoor recreation per week day. They contend that this prevents meaningful exercise, as it only permits them to walk slowly, in short steps, around the main floor of the cell block. (Id. Ex B, p. 103; C, p. 7-8; D, p. 57-58). Male inmates have adduced evidence that during segregation, which often lasts for months at a time, the inmates are not allowed outside to exercise. (Id. Ex. J, p. 2; P, p. 3). Protracted segregation allegedly has contributed to the weakening of muscles. (Id. Ex. J, p. 2). In 2008, the DOC found that NCP's denial of outdoor

recreation to segregated male inmates rendered it noncompliant with state law. (Id. Ex. AA, p. 26).

The female inmates also lodge complaints that are particular to their sub-class. First, they complain of the use of "bunk restriction," a practice under which female inmates are required to remain in their beds virtually all day, save a few hours for recreation. (Id. Ex. H, 148; R, 43). Female inmates have allegedly spent several months on bed restriction, which has led to physical pain and psychological suffering. (Id. Ex. G, p. 83; Q, p. 4; R, p. 4).[28] Second, female inmates are allegedly treated unequally with regard to the work release and recreation programs. While NCP maintains separate living quarters for male prisoners authorized to participate in work release, no such accommodations are maintained for similarly situated female inmates. (Id. Ex. W, p. 15; V, p. 22; AA, p. 23). Female inmates aver that this effectively prevents them from participating in work release programs, which has negative economic consequences for them, including, but not limited to, rendering them unable to pay probation costs. (Id. Ex. T, p. 71). With regard to recreation, the female inmates aver that the male

[28] When females are on bunk restriction they allegedly only receive an hour of recreation, which is generally limited to indoors. (Id. Ex. H, p. 69-70; U, p. 20; V, p.91). Evidence indicates that, in general, 2 or 3 women are on bunk restriction status each day, with 5 or 6 women being the largest number simultaneously so confined. (Id. Ex. H, 147-48).

inmates are entitled to use a large outdoor recreation yard that contains basketball and volleyball courts, as well as other facilities, whereas the female inmates are relegated to an extremely small yard with a swing and barely enough space to walk. (Id. Ex. G, p. 89-90; H, p. 95). Except in rare instances, female inmates are not permitted to use the large recreation yard. (Id. Ex. H, p. 95; O, p. 6; R, p. 3). Further, female inmates contend that general population male inmates are entitled to 2 hours of outdoor recreation, whereas general population female inmates are only afforded one hour of outdoor recreation per day. (Id. Ex. H, p. 72). Female inmates allege that they are often denied outdoor recreation time because NCP allegedly lacks adequate staff. (Id. Ex. H, p. 72; O, p. 6).

2. Standard of Review

When reviewing a motion to certify a class action, courts must engage in "a thorough examination of the factual and legal allegations." Newton v. Merrill Lynch, Pierce, Fenner, & Smith, Inc., 259 F.3d 154, 166 (3d Cir. 2001) (citing Barnes v. Am. Tobacco Co., 161 F.3d 127, 140 (3d Cir. 1998)). Indeed, "'it may be necessary for the court to probe behind the pleadings before coming to rest on the certification question.'" Newton, 259 F.3d at 166 (citing Gen. Tel. Co. Of Southwest v. Falcon, 457 U.S. 147, 160 (1982)). In evaluating and resolving class certification issues such as those before us, courts must conduct a "rigorous

analysis" in order to determine whether those individuals seeking to sue a party as representatives of a class have adhered to the mandates of Federal Rule of Civil Procedure 23 ("Rule 23"). Gen. Tel. Co. of the Southwest v. Falcon, 457 U.S. 147, 161 (1982).

> Rule 23 sets forth four specific prerequisites to a class action:
>
> (1) the class [must be] so numerous that joinder of all members is impracticable;
>
> (2) there [must be] questions of law or fact common to the class;
>
> (3) the claims or defenses of the representative parties [must be] typical of the claims or defenses of the class; and
>
> (4) the representative parties [must] fairly and adequately protect the interests of the class.

Fed. R. Civ. P. 23(a). In addition to the foregoing, an action may only be maintained as a class action if one of the three conditions cited within the sub-parts of Rule 23(b) is applicable.[29] See Baby Neal v. Casey, 43 F.3d 48, 55 (3d Cir. 1994) (citations omitted). "Plaintiffs bear the burden of proving all of the requirements for certification." Holmes v. Pension Plan of Bethlehem Steel Corp., 1999 U.S. Dist. Lexis 10467, at *8 (citing Eisen v. Carlisle & Jacquelin, 417 U.S.

[29] All three classes of Plaintiffs seek certification solely pursuant to Rule 23(b)(2). (See Rec. Doc. 9 ¶ 3). This provision permits certification if "the party opposing the class has acted or refused to act on grounds that apply generally to the class, so that final injunctive relief or corresponding declaratory relief is appropriate respecting the class as a whole." Fed. R. Civ. P. 23(b)(2).

156, 178 (1974)).

3. Threshold Matters

Defendants assert that some of the claims for which Plaintiffs seek certification have been mooted by changes within the prison implemented subsequent to the filing of the initial Complaint. More specifically, Defendants assert that Plaintiffs' challenge to the adequacy of the nursing staff at NCP is moot because the prison has hired a second LPN to work from 2:00 p.m. until 11:00 p.m. on weekdays. Defendants assert that the nurses and Dr. Hynick are also available telephonically on weekdays from 11:00 p.m. until 7:00 a.m. Further, Defendants assert that the male inmates' challenge to recreational opportunities when segregated is now moot because the prison has erected a fence in the male recreational area, thereby creating two separate recreational facilities, one for segregated male inmates and the other for general population male inmates.

Quite simply, Defendants' contentions are specious. It is well established that an exception to the mootness doctrine exists when a defendant voluntarily ceases to engaged in a previously challenged practice. Friends of the Earth v. Laidlaw Environ. Servs., 528 U.S. 167, 189 (2000) (stating that if such an exception did not exist, a defendant could use the mootness doctrine to evade judicial intervention and then resume the challenged conduct after the claim

against him had been legally mooted). Certainly, that rationale applies in the instant case. If Plaintiffs' nursing claim was in fact mooted, subsequent to this mooting Defendants would be free to scale back the nursing coverage at NCP to pre-mooting levels. If after this scaling-back occurred, the inmates sought to lodge the nursing claim again, Defendants could simply avoid judicial intervention by again increasing the nursing coverage at NCP. We believe that this is a classic instance where the voluntary cessation exception to the mootness doctrine has been employed, and so we will do so.

The same is true for Plaintiffs' recreational claims, since the remedy at issue involves using a fence to bifurcate the male recreational area into an area for segregated males and an area for general population males. If the voluntary cessation exception did not apply, after the mooting of this claim Defendants would be free to remove the fence, with little effort or expense, and revert to its pre-mooting policies regarding recreation for segregated male inmates. If after the reversion to the old policy Plaintiffs sought to reinstate their recreational claim, the Defendants could evade judicial intervention by once again voluntarily ceasing the challenged activity. Like the nursing claims, we believe that this is a quintessential instance where a court should employ the voluntary cessation exception. Accordingly, we will do so.

We now proceed to an analysis of the merits of each class' Motion to Certify.

4. Global Class Certification

As afore-referenced, the dictates of Rule 23(a) require that plaintiffs seeking class certification satisfy four requirements: numerosity, commonality, typicality, and adequacy of representation. Fed. R. Civ. P. 23(a). We will address these requirements *seriatim*.

a. Numerosity

With regard to numerosity, Rule 23(a)(1) mandates that the proposed class be "so numerous that joinder of all class members is impracticable." Fed. R. Civ. P. 23(a)(1). Defendants assert that Plaintiffs fail to delineate the composition of the proposed class because there are no specific averments as to the number of inmates who were subjected to each allegedly violative prison condition. For example, Defendants claim that Plaintiffs failure to identify the number of inmates placed in four point restrains is fatal to their attempt to certify their class with respect to that claim. In support of this proposition, Defendants cite Hancock v. Thalacker, 933 F. Supp. 1449 (N.D. Iowa 1996), which held,

> Plaintiffs failed to identify even the approximate size of the class of persons *actually subjected* to the assertedly unconstitutional conduct in

> question . . . or to demonstrate the impracticability of joinder when so few people have actually been identified has having comparable claims. Instead, Plaintiffs rely on conclusory statements that anyone who has ever been or ever will be an inmate at [the prison] is a class member. The Court reiterates that such conclusory statements will not do. At minimum, the Court concludes that Plaintiff should have produced some reliable estimate of the number of inmates who have been disciplined . . . .

Hancock, 933 F.Supp. at 1467 (emphasis added).

As Hancock notes, Plaintiff need only provide an *estimate* of the number of inmates subjected to particular conduct. It has been held that "in securities actions, federal courts are quite willing to accept common sense assumptions to support a finding of numerosity." Peil v. Speiser, 97 F.R.D. 657, 659 (E.D. Pa. 1983) (internal citations and quotations omitted). The numerosity requirement has been relaxed in cases such as that at bar, where injunctive and declaratory relief is sought. See Jackson v. Danberg, 240 F.R.D. 145, 147 (D. Del. 2007) (citing Grant v. Sullivan, 131 F.R.D. 436, 446 (E.D. Pa. 1990) (citing Weiss v. York Hospital, 745 F.2d 786, 808 (3d Cir. 1984))). Since courts are willing to accept common sense assumptions as to numerosity in securities cases, where monetary damages are often at issue, we believe that the relaxed numerosity standard in cases seeking injunctive and declaratory relief would permit us to employ the

same common sense assumption in the case at bar.[30]

In terms of numerosity, global inmates have alleged the following. With respect to the systematic deficiencies in medical and psychological care, Plaintiffs have not alleged specific numbers but have adduced evidence that indicates there has been a proliferation of serious medical and psychiatric problems experiences by inmates at NCP, (See generally Br. Supp. Ex. T). Indeed Plaintiffs have adduced evidence that Warden Reish stated at a Board meeting in November 2006, "during the last month we have received numerous inmates that have grave medical problems . . . ." (Id. Ex. T, p. 57). Reish further stated at a Board meeting in April 2008, "We continue to receive an unusually large number of medical . . . inmates in our institution." (Id. Ex. T, p. 169). Prison records indicate that, on average, anywhere between 180 and 210 inmates of both genders are confined at NCP monthly. (See id. generally). In 2007, 1500 inmates of both genders passed through NCP. (Id. Ex. T, p. 155). Therefore, based on Reish's comment regarding

[30] As Plaintiffs note, "[T]he issue [of numerosity] is merely whether the representative plaintiff[s] ha[ve] demonstrated the probability of the existence of a sufficient number of persons similarly inclined and similarly situated to render the class action device the appropriate mechanism for obtaining judicial determination of the rights alleged." Stewart v. Assocs. Consumer Discount Co., 183 F.R.D. 189, 195 (E.D. Pa. 1998) (citing Dawes v. Philadelphia Gas Comm'n, 421 F. Supp. 806 813 (E.D. Pa. 1976)). "[W]here the numerosity question is a close one, the trial court should find that numerosity exists, since the court has the option to decertify the class later pursuant to Rule 23(c)(1). Id. (citing Rogers v. Elec. Data Systems Corp., 160 F.R.D. 532, 537 (E.D.N.C. 1995)).

the inmates with medical needs and on the prison's population, we feel that it is logical to assume that the number of plaintiffs affected by the allegedly systematic deficiencies in medical care surpasses the threshold at which joinder is no longer practicable. Therefore, we find that the global inmates have satisfied the numerosity requirement as to the alleged medical deficiencies.

With regard to the putative deficiencies in psychiatric care, Plaintiffs have adduced evidence that as of July 2006, Reish believed that 25% of the inmate population received psychotropic medication. We believe it only logical that this figure also accurately represents that number of inmates who would be affected by deficiencies in mental health care. This would mean that, on a monthly basis, approximately 45-53 inmates could require mental health care. This number certainly exceeds the threshold for joinder. Therefore, we believe that the global inmates have satisfied the numerosity requirement as to their mental health care claims.

As to the alleged deficiencies in dental care, Plaintiffs again fail to provide a numerical estimate of the number of inmates affected thereby. However, Plaintiffs have adduced testimony from Dr. Hynick that "[d]ental problems are a common medical condition at any Prison." (Id. Ex. MM, p. 1). Even f this problem plagued only 10% of the prison population, 18-21 inmates would be

affected, a number which surpasses the threshold for joinder.[31] Since Dr. Hynick has asserted that dental problems are common in prison populations, we believe that it is reasonable to assume that more than 10% of the population was adversely affected by the alleged deficiencies in dental care. Accordingly, we conclude that the global plaintiffs have satisfied the numerosity requirement as to this claim.

With regard to confinement in basement cells, Plaintiffs have adduced evidence that 202 inmates of both genders were confined in the basement cells during the two and a half years encompassed by discovery. (Id. Ex. S, p. 6, 17-31). Further, at least 21 incidents of subjecting global plaintiffs to four point restrains were documented. We believe that these numbers are sufficient in satisfying the numerosity requirement. As for the alleged safety hazards and environmental deficiencies (i.e. vermin infestation, extreme temperatures, poor ventilation, fire hazards, etc.), these conditions are ubiquitous throughout the prison, as is evident from the fact that they are common complaints of both male and female prisoners. Therefore it can reasonably be inferred that they affect most, if not all, of the inmates at NCP. Consequently, we believe that inmates have satisfied the numerosity requirement as to these claims.

[31] This court has recognized that it "may certify a class even if it is composed of as few as 14 members." Grant v. Sullivan, 131 F.R.D. 436, 446 (M.D. Pa. 1990).

Although the overcrowding claim is global in nature, it produces different consequences within NCP based upon gender. The males assert that overcrowding manifests itself through the triple celling of inmates, particularly in the segregated units of the male housing unit. The females contend that overcrowding has resulted in up to 35 females being housed in an area that was designed to hold no more than 28 inmates. While there is no precise account of either the quantity of males subjected to triple celling or the number of females affected by overcrowding in the female dormitory, there is evidence from which the existence of overcrowding can be inferred.

In July 2006, Warden Reish reported that the prison population was at a "manageable level of 193." (Id. Ex. T, p. 37-38). However, during the summer of 2008, when the overcrowding problem allegedly reached a crescendo, Warden Reish reported an influx of inmates. In June 2008, he stated that there was a "record total" of 239 inmates, and from July 2008 until September 2008 he noted that the population was consistently over 200 inmates. (Id. Ex T, p. 188, 194, 205, 211). Not coincidentally, from July 2008 through September 2008, NCP experienced an increased number of psychological problems. (Id. Ex. T, p. 194, 205, 211). Courts in other circuits have recognized that prison overcrowding increases the likelihood of psychological injury to inmates. Williams v. Griffin,

952 F.2d 820, 826 (4th Cir. 1991) (citing Johnson v. Levine, 588 F.2d 1378, 1380 (4th Cir. 1978)); see also Lareau v. Manson, 506 F. Supp. 1177, 1186 (D. Conn. 1980). While we recognize that the increased level of psychological problems at NCP during summer 2008 does not necessarily indicate that the prison was overcrowded during that time frame, for the purposes of class certification all Plaintiffs need do is produce evidence that demonstrates the probability that a sufficient number of inmates experienced overcrowding. We think it reasonable that the simultaneous occurrence of an increased inmate population and heightened number of psychological problems satisfies this requirement.[32]

The global inmates' failure to repair claims involve Plaintiff Wyland's averment about a leaky roof, Plaintiff Williams' complaint about the proliferation of mold on a wall in the women's dormitory, the failure to remedy intermittent

[32] To expound upon this conclusion, given the correlation between an overcrowded prison population and the heightened number of psychological problems, we believe that the coincidence of an increase prison population and an increase in psychological problems at NCP is sufficient in establishing an overcrowding problem at that facility. While this does not establish the exact number of inmates affected by overcrowding, we believe that overcrowded conditions potentially impact the entire prison population in that any male inmate could be subjected to triple celling, any female inmate could be subjected to confinement in a cramped dormitory, and all inmates are potentially plagued by the residual effects of overcrowding, i.e. the exacerbation of previously existing oppressive conditions. Therefore, we conclude that the global inmates have established sufficient numerosity in regards to their overcrowding claims. While this conclusion may be strained, we note that when, as here, the numerosity question is a close one, courts should find that numerosity exists, since the class can be decertified pursuant to Rule 23(c)(1) if it is later determined that joinder is not impracticable. See Stewart, 183 F.R.D. at 195 (citing Rogers, 160 F.R.D. at 537).

shortages of hot water, and failure to clean or replace damaged mattresses. With regard to Wyland's claim, the leaky roof would seem to exclusively affect those who slept proximate to it. Therefore, we do not believe that numerosity has been satisfied as to that claim. With regard to Williams' claim that the mold adversely affected her breathing, it would appear that such claims could only be asserted by those inmates in close proximity to the mold, meaning that numerosity has not been satisfied there either. As for the allegedly breached mattresses, the only inmates affected were those who received the compromised mattresses. There is no evidence that this number is so large that joinder is impracticable and therefore, numerosity has not been satisfied on that point.[33] However, with regard to the lack of hot water, this appears to be a condition that could conceivably affect a large segment of the inmate population since water is a communal resource. Therefore, we conclude that the global inmates have satisfied numerosity in this regard.[34]

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[33] For the same reason, we also believe that the contention involving the failure to distribute underclothing upon commitment to NCP does not satisfy numerosity. The only inmates affected by this would be those who were not issued underclothes. There is no indication, nor is there any reliable estimate, as to the number of inmates so affected.

[34] We believe that this is an appropriate point to articulate a distinction we have drawn in passing judgment on the numerosity issue. Conditions that affect the prison population on a large scale (i.e. temperature, lack of access to medical professionals, etc.) easily satisfy the numerosity requirement because, since they are ubiquitous in nature, they "demonstrate the probability of the existence of a sufficient number of persons similarly inclined and similarly situated." See Stewart,183 F.R.D. at 189. Since this inference can be drawn readily, Plaintiffs

The final claim of the global inmates involves the lack of a confidential area for legal visits. Plaintiffs' brief in support alleges that "some legal visits take place in the . . . law library. However, these visits often occur in a cubicle" that is unenclosed and proximate to many well traveled areas of the prison. Br. Supp. P. 61. Plaintiffs then include the testimony of two inmates to support the contention that the confidentiality issue is pervasive. We find it unavailing. While the area that Plaintiffs' describe could reasonably raise a question as to confidentiality, they do not quantify the number of inmates that are affected by this condition. Further, there is no reliable estimate as to the number of inmates so affected because Plainitffs' themselves admit that only *some* of the visits occur in the library and, of those visits, only *some* take place in the described cubicle. Plaintiffs do not describe the conditions under which the other visits are

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need not provide more precise numerical evidence in support of these claims. On the other hand, Plaintiffs bear a heavier burden when more localized or personal claims (i.e. a leaky roof, moldy wall, etc.) are involved. Further, we believe that there is a distinction to be made between conditions/policies that automatically tend to affect large segments of the population merely by becoming extant, and conditions/policies that do not necessarily affect a large segment of the population merely by becoming extant, although such a large-scale affect is possible. An example of the former is the lack of hot water in the prison; if there is no hot water when one inmate showers, there is a high probability that there will not be hot water when a large number of other inmates shower. Numerosity can be readily inferred in such instances without much empirical evidence. Examples of the latter are the breached mattresses and the failure to issue undergarments to inmates upon institutionalization. While NCP may have a policy of failing to properly inspect mattresses or failing to issue undergarments upon institutionalization, the mere fact that a few inmates received breached mattresses or did not receive undergarments does not necessarily mean that a large number of inmates also suffered similarly. Thus, in such situations, numerosity is not so readily inferred in the absence of reliable empirical data.

conducted. Therefore, we cannot reasonably conclude that the number of inmates adversely affected by the alleged lack of confidentiality is so numerous that joinder is impracticable. Accordingly, we deny certification on this issue.

Since the strictures of Rule 23(a) are conjunctive, the aforementioned claims that have not satisfied the numerosity requirement do not qualify for class certification. Accordingly, we will deny certification of these claims. As for those claims satisfying numerosity, we proceed to analyze them under the additional Rule 23(a) requirements.

b. Commonality

To satisfy the commonality requirement, the global inmates must demonstrate the existence of at least one question of law or fact common to the class. See Johnston v. HBO Film Mgmt., 265 F.3d 178, 184 (3d Cir. 2001). While some differences in the factual circumstances are not sufficient, in and of themselves, to destroy commonality, Samuel v. University of Pittsburgh, 538 F.2d 991, 995 (3d Cir. 1976), the putative class must allege that the defendant(s) harmed them in the same general fashion. Kane v. United Indep. Union Welfare Fund, 1998 WL 78985 *4 (E.D. Pa. 1998) (citing Open House Cnt. Inc. v. Samson Mgmt. Corp., 152 F.R.D. 472, 476 (S.D.N.Y. 1993)).

Commonality is satisfied when the claims involve some common questions and when plaintiffs allege harm under the same legal theory. In re Loewen Group Inc. Securities Litigation, 233 F.R.D. 154, 162 (E.D. Pa. 2005). Here, since similarly situated global inmates are subjected to the same policies, procedures, and customs the factual circumstances underlying their claims are necessarily similar. Moreover, the claims of all similarly situated global inmates share a common question of law, specifically, whether they were deprived of their rights pursuant to the constitutional provision under which they seek redress. Finally, all similarly situated global inmates posit the same constitutional argument to similar conditions, i.e. all convicted inmates lodge Eighth Amendment claims challenging their conditions of confinement, whereas all pretrial detainees lodge Fourteenth Amendment claims challenging the conditions of their confinement. Therefore, it appears, at first glance, that all of Plaintiffs' claims may satisfy the commonality requirement.

However, Defendants assert that, in spite of all the common undertones recounted above, courts have consistently denied class certification of claims involving the imposition of allegedly unconstitutional conditions upon putative class members, rather than the class in general, when the validity of the claims necessitates an individual fact-specific analysis. See Kirkman v. North Carolina

R.R. Co., 220 F.R.D. 49, 52-53 (M.D.N.C. 2004); Garris v. Gianetti, 160 F.R.D. 61, 65 (E.D. Pa. 1994); Ray v. Rockefeller, 352 F. Supp. 750, 757 (N.D.N.Y. 1973). The Defendants contend that the instant action requires such an inquiry and argues against certification based thereon.

In particular, Defendants note that this action is one that sounds in 42 U.S.C. § 1983. Both specific individuals and the County of Northumberland are being sued. In order to establish municipal liability under § 1983, a plaintiff must show that the municipality's policy, custom, or practice was the moving force behind the alleged constitutional violation. Monell v. Dept. of Soc. Servs., 426 U.S. 658, 691 (1978); Simmons v. City of Philadelphia, 947 F.2d 1042, 1062 (3d Cir. 1991). Accordingly, before a municipality can be found liable under Monell, a plaintiff must first demonstrate that a constitutional violation has occurred. Woloszyn v. County of Lawrence, 396 F.3d 314 (3d Cir. 2005).

The case sub judice contains a plethora of claims sounding in different constitutional provisions; however, Defendants only challenge the commonality of claims sounding in the Eighth Amendment, which, as we noted above, is applicable to convicted inmates' claims involving conditions of confinement.[35]

[35] The Defendants do not appear to challenge claims based on other constitutional grounds and thus, we assume they do not oppose certification of these claims on commonality grounds.

These claims involve substandard medical care claim[36] and the use of excessive force.[37]

While Defendants' arguments are appealing at first blush, a closer examination of the relevant case law persuades us that their positions are untenable under the instant circumstances. Contrary to Defendants' characterizations, Plaintiffs do not challenge individual instances of unconstitutional conduct; rather, they challenge the general policies, customs, and practices employed by NCP that are allegedly violative of the Constitution. See generally (Rec. Doc. 1); (Rec. Doc. 94, p. 20). With regard to Plaintiffs' medical claims, Plaintiffs note that proving knowledge and disregard of an excessive risk is not the only means of proving deliberate indifference. Additionally, deliberate

[36] To cast an Eighth Amendment claim in the context of medical care, the relevant inquiry, as Defendants aptly note, is whether prison officials were deliberately indifferent to an inmate's serious medical needs. Monmouth County Corr. Inst. Inmates v. Lanzaro, 834 F.2d 326, 346 (3d Cir. 1987). Thus, a prison official is liable if he or she "knows of and disregards an excessive risk to inmate health or safety." Farmer v. Brennan, 511 U.S. 825, 837 (1994). Consequently, Defendants assert that since liability is based upon a fact intensive inquiry, i.e. whether the Defendant knew and disregarded an excessive risk, the issues cannot be considered "common" and therefore are not suitable for class certification.

[37] The excessive force claim is presumably grounded in the application of four point restraints and could possibly extend to the shackling of segregated inmates during recreation. "In an excessive force claim, the central question is 'whether force was applied in a good-faith effort to maintain or restore discipline, or maliciously and sadistically to cause harm.'" Brooks v. Kyler, 204 F.3d 102, 106 (3d Cir. 2000) (quoting Hudson v. McMillian, 503 U.S. 1, 7 (1992)). Although not explicitly articulated, we can assume that Defendants' position is that the good-faith inquiry is a fact-based one and therefore disqualifies the excessive force claim from certification, as it renders those claims "uncommon."

indifference can be demonstrated by showing systematic deficiencies in staffing, facilities, equipment or procedures such that the inmate population is effectively denied access to adequate medical care. Inmates of Allegheny County Jail v. Pierce, 487 F. Supp 638, 643 (W.D. Pa. 1980); see also, Wellman v. Faulkner, 715 F.2d 269, 272 (7th Cir. 1983). Consequently, an individualized inquiry into the mental state of the perpetrator in each of Plaintiffs' claims is unnecessary, therefore rendering Defendants' argument unavailing in the medical care context.

With regard to the excessive force claim, Plaintiffs insinuate that individual facts will not affect the outcome of the true legal issue, which is the constitutionality of the policies and standard protocols used by NCP in employing four point restraints. See Baby Neal, 43 F.3d at 57 (stating that where, as here, the plaintiffs seek declaratory and injunctive relief against defendants who allegedly engaged in a systematic course of conduct that deprived plaintiffs of their rights, individualized determinations of liability often will not be necessary because any differences in the factual background of each plaintiff's claim will not affect the outcome of the legal issue). We agree. Plaintiffs are not suing the individual prison employees who physically carried out NCP policies that are allegedly violative of the Constitution; rather, they sue individuals who enact those policies, the warden and various board members. (See generally Compl.). Therefore,

whether a particular occurrence of four point restraint was occasioned by a malicious or sadistic prison official has no bearing on whether the policies or protocols governing the implementation of those procedures are themselves constitutional. Accordingly, we find Defendants' argument unpersuasive in relation to the four point restraint claim.

In light of all of this, we conclude that the global inmates have satisfied the commonality requirement with regard to the claims that have progressed through the Rule 23(a) analysis.

c. Typicality

"The requirement that the class representatives' claims be typical of the claims or defenses of the class is intended to 'ensure that the class representatives' pursuit of their own goals will work to benefit the entire class.'" Mardocki v. Old Republic Nat'l Title Ins. Co., 254 F.R.D. 242, 249 (E.D. Pa. 2008) (quoting Barnes v. Am. Tobacco Co., 161 F.3d 127, 141 (3d Cir. 1998)). "If the claims of the named plaintiffs and class members involve the same conduct by the defendant, typicality is established." Newton v. Merrill Lynch, Pierce, Fenner & Smith, Inc., 259 F.3d 154, 183-84 (3d Cir. 2001). "Factual differences will not render a claim atypical if the claim arises from the same event or practice or course of conduct that gives rise to the claims of the class members, and if it is

based on the same legal theory." Hoxworth v. Blinder, Robinson & Co., 980 F.2d 912, 923 (3d Cir. 1992). "Where an action challenges a policy or practice, the named plaintiffs suffering one specific injury from the practice can represent a class suffering other injuries, so long as all the injuries are shown to result from the practice." Mardocki, 254 F.3d at 249 (quoting General Tel. Co. of Southwest v. Falcon, 457 U.S. 147, 157 (1982); see also Beck v. Maximus, Inc., 457 F.3d 291, 95-96. (3d Cir. 2006). The class representatives must only prove that there is a pervasive violation has produced the various injuries. Falcon, 457 U.S. at 157.[38]

In the case sub judice, the putative class representatives of the global inmates allege that they have been deprived of various constitutional rights as a result of systemic deficiencies in numerous NCP policies and practices. These policies and practices are equally applicable to the entire inmate population. Therefore, if the polices and practices are ultimately determined to be unconstitutional, the violations engendered by them would be pervasive in nature. Moreover, if these policies and practices are unconstitutional, all global inmates,

[38] The requirements of commonality and typicality are often merged because they focus on similar aspects of the alleged claims. However, they are separate and distinct requirements. The Third Circuit has articulated distinction between these requirements as follows: "[C]ommonality, like 'numerosity' evaluates the sufficiency of the class itself, and 'typicality' like 'adequacy of representation' evaluates the sufficiency of the named plaintiff . . . ." Hassine v. Jeffes, 846 F.2d at 176 n.4 (3d Cir 1988).

regardless of the precise factual underpinnings of their claims, would have causes of action similar to those proffered by their putative class representatives. Consequently, it appears that the global inmates have established typicality.

However, before conclusively reaching this determination, we must address Defendants' argument on this issue. With regard to the typicality of global inmates' claims, the Defendants assert that three of the originally named Plaintiffs have no standing to assert their claims, which logically precludes their claims from being "typical." We can only assume that Defendants refer to inmates Corely, Anderson, and Holohan. However, we have already dismissed these Plaintiffs from the instant action because they lacked standing. Accordingly, we have not considered any evidence relative to these inmates in reaching any of our class certification determinations. Further, absent these individuals, the global inmates still have at least five viable representatives who, as a result of their confinement in NCP and their subjection to the policies and customs employed therein, have claims that are typical of all the claims proffered by the remaining NCP inmates. Therefore, we find Defendants' argument unavailing and conclude that the global inmates have satisfied the typicality requirement.

d. Adequacy of Representation

The adequacy requirement entails two inquiries: (1) whether the attorneys

retained by the named Plaintiffs are qualified, experienced, and generally able to conduct the litigation; and (2) whether the named Plaintiffs themselves have interests that are antagonistic to or in conflict with those they seek to represent. Barnes v. Am. Tobacco Co., 161 F.3d at 141 (3d Cir 1998).

Plaintiffs' counsel has litigated numerous § 1983 actions in federal court. In light of that, we believe that Plaintiffs' counsel certainly satisfies the first prong of the adequacy inquiry. However, Defendants assert that the Plaintiffs do not satisfy the second prong of that inquiry because a number of the original named Plaintiffs have either been dismissed from the action or have voluntarily withdrawn. As we have stated, such a consideration is of no moment because there still remain class representatives whose interests are not in conflict with the inmates they seek to represent. In fact, the interests of the remaining putative representatives are perfectly aligned with those of the putative class; namely, they wish to rectify the conditions at NCP so that current and future inmates are not subjected to deprivations of their constitutional rights while institutionalized at NCP. We therefore conclude that the adequacy prong has been met. We now proceed to a consideration of Rule 23(b).

e. Rule 23(b)

To recapitulate, Rule 23(b) is applicable when "the party opposing the class

has acted or refused to act on grounds that apply generally to the class, so that final injunctive relief or corresponding declaratory relief is appropriate with respect to the class as a whole." Fed. R. Civ. P. 23(b). Where, as here, injunctive and declaratory relief are sought, the dictates of Rule 23(b) are "almost automatically satisfied . . . . What is important is that the relief sought by the named plaintiffs should benefit the entire class." Baby Neal, 43 F.3d at 58-59. "However, courts in the Third Circuit have consistently held that Rule 23(b) class claims must be 'cohesive.'" Agostino v. Quest Diagnostics, Inc., 2009 WL 348898 *6 (D.N.J. 2009) (citing Barnes v. Am. Tobacco, 161 F.3d at 143; Wetzel v. Liberty Mut. Ins. So., 508 F.2d 239, 248 (3d Cir. 1975); In re Unisys Corp. Retiree Medical Benefits Litig., 2003 WL 252106 *3 (E.D. Pa. 2003). Accordingly, the Third Circuit has "committed to the district court the discretion to deny certification in Rule 23(b)(2) cases in the presence of 'disparate factual circumstances.'" Geraghty v. United States Parole Comm'n, 719 F.2d 1199, 1205-06 (3d Cir. 1983) (quoting Carter v. Butz, 479 F.2d 1084, 1089 (3d Cir. 1973)). Accordingly, Rule 23(b) "may not be invoked in a case requiring 'significant individual liability or defense issues which would require separate hearings for each class member in order to establish defendants' liability.'" Agostino, 2009 WL 348898 *6 (quoting Arch v. Am. Tobacco Co., Inc., 175 F.R.D. 469, 482

(E.D. Pa. 1997)).

Here, the injunctive and declaratory relief sought by Plaintiffs will benefit the entire class, as it would serve to remedy the allegedly unconstitutional conditions experienced by all global inmates at NCP. Further, as we have stated in our "commonality" discussion, we do not believe that determinations regarding individual liability issues are required in order to determine the constitutionality of the challenged prison policies or conditions. Therefore, it is our belief that individual liability issues will not affect the cohesiveness of the putative class. Consequently, we conclude that the global inmates have satisfied the dictates of Rule 23(b).

f. Conclusion

As a result of the foregoing discussion, we believe that the global inmates have satisfied the class certification requirements with regard to all of their claims save those involving the failures to repair the leaky roof in the women's dormitory, to remove mold from the wall in the women's dormitory, to repair breached mattresses, to issue undergarments upon institutionalization, and to provide a confidential space in which to conduct legal discussion with counsel. We shall not certify these claims because Plaintiffs have failed to establish the requisite numerosity described in Rule 23(a).

2. Male Class Certification

The male inmates seek certification as a sub-class of the global inmates on the claim that male inmates in the segregation unit have been shackled during recreation, thereby denying them meaningful exercise, and have been deprived of outdoor recreation, both in violation of their constitutional rights.

a. Numerosity

The shackling of segregated male inmates during recreation and the denial of outside recreation to segregated male inmates is ubiquitous throughout that sub-class of inmates. We are not aware of the number of inmates that the male segregated unit was designed to accommodate, but we do know, by virtue of the numerous accounts of triple celling in the segregated unit, that the number of male inmates actually housed in the segregated unit exceeds the number it was designed to accommodate. Additionally, Plaintiffs have adduced evidence from six male inmates attesting to these conditions in the segregated male unit during the approximately two and a half year discovery period. Further, all male members of the prison are subject to being confined in the male segregated housing unit, meaning that all males may be confined under the allegedly unconstitutional conditions. In light of this, we believe that the male inmates have satisfied the numerosity requirement, as they have "demonstrated the probability of the

existence of a sufficient number of persons similarly inclined and similarly situated to render the class action device the appropriate mechanism for obtaining judicial determination of the rights alleged." Stewart v. Assocs. Consumer Discount Co., 183 F.R.D. at 195 (citing Dawes v. Philadelphia Gas Comm'n, 421 F. Supp. at 813). Accordingly, we will proceed with the Rule 23(a) analysis.

b. Commonality

To reiterate, commonality is satisfied when the claims involve some common questions and when plaintiffs allege harm under the same legal theory. In re Loewen Group Inc. Securities Litigation, 233 F.R.D. 154, 162 (E.D. Pa. 2005). Since the shackling and recreation policies are applicable to all male inmates, the factual circumstances underlying the male inmates' claims are necessarily similar to a certain degree. Moreover, the claims of all male inmates share a common question of law, specifically, whether the male inmates were deprived of their rights pursuant to the constitutional provision under which they seek redress. Finally, all of the male inmates posit the same constitutional argument to similar conditions, i.e. all convicted male inmates lodge Eighth Amendment claims challenging the shackling and recreation policies, whereas all pretrial detainees lodge Fourteenth Amendment claims challenging same. Therefore, it appears that all of the male inmates' claims satisfy the commonality requirement.

However, Defendants postulate that liability on these claims will require extensive individualized inquiries, which would destroy commonality. Plaintiffs claim that individual facts will not affect the outcome of the true legal issue, which is the constitutionality of the policies and standard protocols used by NCP in shackling and denying outside recreation to the male inmates. See Baby Neal, 43 F.3d at 57. We agree. Plaintiffs are not suing the individual prison employees who physically carried out NCP policies that are allegedly violative of the Constitution; rather, they sue the policy makers themselves. (See generally Compl.). Therefore, whether a particular occurrence of shackling or denial of outside recreation was unconstitutional has no bearing on whether the policies or protocols governing the same are themselves constitutional. Accordingly, we find Defendants' argument unpersuasive in relation to the shackling and recreation claims of the male inmates. Consequently, we conclude that the male inmates have satisfied the commonality requirement.

c. Typicality

To reiterate, "Factual differences will not render a claim atypical if the claim arises from the same event or practice or course of conduct that gives rise to the claims of the class members, and if it is based on the same legal theory." Hoxworth, 980 F.2d at 923. "Where an action challenges a policy or practice, the

named plaintiffs suffering one specific injury from the practice can represent a class suffering other injuries, so long as all the injuries are shown to result from the practice." Mardocki, 254 F.3d at 249 (quoting Falcon, 457 U.S. at 157); see also Beck, 457 F.3d at 295-96. The class representatives must only prove that there is a pervasive violation has produced the various injuries. Falcon, 457 U.S. at 157.

In the case sub judice, all of the male inmates are subjected to the same practices and policies regarding shackling and recreation. The putative class representatives of the male inmates allege that they have been deprived of various constitutional rights as a result of the shackling and recreation policies and practices employed by NCP. These policies and practices are equally applicable to the entire male inmate population. Therefore, if these policies and practices are ultimately determined to be unconstitutional, the violations engendered by them would be pervasive in nature. Moreover, if these policies and practices are unconstitutional, all male inmates, regardless fo the precise factual underpinning of their claims, would have causes of action similar to those proffered by the putative male class representatives. Consequently, it appears that the putative male class representatives have satisfied the typicality requirement.

Before conclusively reaching this determination, we must address

Defendants' argument on this issue. With regard to the typicality of the male inmates' claims, the Defendants interpose a standing argument identical to that posited in opposition to the certification of the global inmates. We reject it for the reasons afore-stated, and consequently conclude that the global inmates have satisfied the typicality requirement.

d. Adequacy of Representation

The Defendants challenge the adequacy of the male inmates' representation on grounds identical to those posited against the global inmates. We reject this contention for the reasons stated above and note that the interests of the putative representatives are perfectly aligned with those of the putative male class because their objectives are identical; namely, they wish to rectify the conditions at NCP so that they and future male inmates are not subjected to deprivations of their constitutional rights while institutionalized at NCP. We therefore conclude that the male inmates have satisfied the adequacy requirement.

e. Rule 23(b)

Again, Rule 23(b) is applicable when "the party opposing the class has acted or refused to act on grounds that apply generally to the class, so that final injunctive relief or corresponding declaratory relief is appropriate with respect to

the class as a whole." Fed. R. Civ. P. 23(b). Rule 23(b) "may not be invoked in a case requiring 'significant individual liability or defense issues which would require separate hearings for each class member in order to establish defendants' liability.'" Agostino, 2009 WL 348898 *6 (quoting Arch v. Am. Tobacco Co., Inc., 175 F.R.D. 469, 482 (E.D. Pa. 1997)).

Here, the injunctive and declaratory relief sought by the putative class representative will benefit the entire class, as it would serve to remedy the allegedly unconstitutional conditions experienced by the male inmates at NCP. Further, as we have stated in our "commonality" discussion, we do not believe that determinations regarding individual liability issues are required in order to determine the constitutionality of the challenged prison policies or conditions. Therefore, it is our belief that individual liability issues will not affect the cohesiveness of the putative class of male inmates. Consequently, we conclude that the male inmates have satisfied the dictates of Rule 23(b).

f. Conclusion

As a result of the foregoing discussion, we believe that the male inmates have satisfied the class certification requirements with regard to all of their claims. We shall therefore grant the Motion to Certify in its entirety insofar as it relates to the putative class of male inmates.

3. Female Class Certification

The female inmates seek certification as a sub-class of the global inmates on the claims that female inmates are subjected to unconstitutional bunk restrictions and unconstitutional discrimination with regard to work release programs and recreational opportunities.

a. Numerosity

While the female inmates have not adduced evidence as to the specific number of female inmates subjected to bed restriction, they have produced evidence that on any given day 2 or 3 women could be on bunk restriction. Evidence also indicates that 13 female inmates were confined in such a manner in the summer of 2008. (Rec. Doc. 73 Ex. Q, p. 4; R, p. 3). We further have before us evidence that in 2007, inmate Williams accrued a year of consecutive bunk restriction. (Id. Ex. G, p. 122). Given that the practice of bunk restriction spans numerous years and that multiple inmates are so confined on any given day, we believe that the evidence raises an inference that the practice of bunk restriction was common in the female dormitory to such an extent that joinder of all female inmates so affected would be impracticable. We believe that the female inmates have therefore satisfied the numerosity requirement with respect to this claim.

With regard to their work release claim, the contention is that the prison prevents female inmates from participating in such a program because it denies qualifying female inmates separate housing, which it provides to qualifying male inmates. However, there is no evidence indicating the number of qualifying female inmates, nor is there any evidence pointing to the number of female inmates that have been denied participation in this program as a result of the aforementioned housing situation. While NCP houses an average of 25-35 female inmates per month, some of these individuals are pretrial detainees, meaning that they have not been adjudicated guilty of any crime and therefore are not eligible for work release. Further, it is reasonable to assume that all of the convicted female inmates do not qualify for work release. Therefore, we have no sound basis on which to infer the number of qualifying female inmates that have been denied work release as a result of the housing situation at NCP. Accordingly, we have no reliable way to determine whether the number of female inmates so affected exceeds the threshold past which joinder would be impracticable, and we will not engage in rank speculation in an attempt to do so. Therefore, we conclude that the female inmates have not satisfied the numerosity requirement as to their work release claims. Consequently, we will deny certification on this claim.

With regard to the allegedly discriminatory recreational practices employed

at NCP, the female inmates have adduced evidence that these policies are applicable to all female inmates. Since 25-35 female inmates are confined at NCP per month, we believe that the female inmates have adduced evidence from which we can infer that the number of inmates affected by the allegedly discriminatory recreation policy exceeds the number beyond which joinder is impracticable. Therefore, we conclude that the female inmates have satisfied the numerosity inquiry with respect to their recreation claims.

b. Commonality

Again, commonality is satisfied when the claims involve some common questions and when plaintiffs allege harm under the same legal theory. In re Loewen Group Inc. Securities Litigation, 233 F.R.D. 154, 162 (E.D. Pa. 2005). The factual circumstances underlying the female inmates' bunk restriction and recreation claims are necessarily similar to a certain degree because they arise out of policies that are applicable to the female inmate population as a whole. Moreover, the claims of all female inmates share a common question of law, specifically, whether they were deprived of their rights pursuant to the constitutional provision under which they seek redress. Finally, all of the female inmates posit the same constitutional argument to similar conditions, i.e. they challenge the bunk restriction policy on First, Eighth, and Fourteenth Amendment

grounds and the recreation claim on Fourteenth Amendment grounds. Therefore, it appears that all of the female inmates' claims satisfy the commonality requirement.

However, Defendants once again argue that liability on these claims will require extensive individualized inquiries, which would destroy commonality. Plaintiffs claim that individual facts will not affect the outcome of the true legal issue, which is the constitutionality of the policies governing the bunk restriction and recreational opportunities of female inmates. See Baby Neal, 43 F.3d at 57. We agree. Plaintiffs are not suing the individual prison employees who physically carried out NCP policies that are allegedly violative of the Constitution; rather, they sue the policy makers. (See generally Compl.). Therefore, individual determinations of constitutionality have no bearing on whether the policies or protocols governing the implementation of those procedures are themselves constitutional. Accordingly, we find Defendants' argument unpersuasive in relation to the policies governing bunk restriction and recreational opportunities of female inmates. Consequently, we conclude that the female inmates have satisfied the commonality requirement in these regards.

c. Typicality

With regard to the claims of the female inmates, Defendants argue that

inmate Williams, as the lone remaining female class representative, has not established that her claims are typical of the putative female class. We remind Defendants that "[w]here an action challenges a policy or practice, the named plaintiffs suffering one specific injury from the practice can represent a class suffering other injuries, so long as all the injuries are shown to result from the practice." Mardocki, 254 F.3d at 249 (quoting Falcon, 457 U.S. at 157); see also Beck, 457 F.3d at 295-96. The class representatives must only prove that there is a pervasive violation has produced the various injuries. Falcon, 457 U.S. at 157.

In the case at bar, inmate Williams, as the putative class representative of the female inmates, alleges that she has been deprived of various constitutional rights as a result of the policies and practices governing bunk restriction and recreation in the female dormitory. These policies and practices are equally applicable to the entire female inmate population. Therefore, if these policies are ultimately determined to be unconstitutional, the violations engendered by them would be pervasive in nature. Moreover, if these policies are unconstitutional, all female inmates, regardless of the precise factual situation of each inmates, would have claims similar to those proffered by inmate Williams. Consequently, we believe that the putative class representative has satisfied the typicality requirement.

d. Adequacy of Representation

The Defendants argue that the male inmates cannot adequately represent the claims of the female inmates. While this is an astute observation, it is inapposite to the instant determination. The salient point is that inmate Williams does not have interests that are antagonistic to the putative female class. In fact, her interests are perfectly aligned with those of the putative female class; namely, she wishes to rectify the conditions at NCP so that current and future female inmates are not subjected to same allegedly unconstitutional deprivations of their rights while institutionalized at NCP. We therefore conclude that adequacy prong has been met.

e. Rule 23(b)

As aforementioned, Rule 23(b) is applicable when "the party opposing the class has acted or refused to act on grounds that apply generally to the class, so that final injunctive relief or corresponding declaratory relief is appropriate with respect to the class as a whole." Fed. R. Civ. P. 23(b). Rule 23(b) "may not be invoked in a case requiring 'significant individual liability or defense issues which would require separate hearings for each class member in order to establish defendants' liability.'" Agostino, 2009 WL 348898 *6 (quoting Arch v. Am. Tobacco Co., Inc., 175 F.R.D. 469, 482 (E.D. Pa. 1997)).

Here, the injunctive and declaratory relief sought by the putative class representative will benefit the entire class, as it would serve to remedy the allegedly unconstitutional conditions experienced by the female inmates at NCP. Further, as we have stated in our "commonality" discussion, we do not believe that determinations regarding individual liability issues are required in order to determine the constitutionality of the challenged prison policies or conditions. Therefore, it is our belief that individual liability issues will not affect the cohesiveness of the putative class of male inmates. Consequently, we conclude that the male inmates have satisfied the dictates of Rule 23(b).

f. Conclusion

In light of the foregoing, we will grant the Motion to Certify insofar as it relates to the putative female class and its bunk restriction and recreation claims. We will deny the Motion to Certify insofar as it relates to the female inmates' not work release claim because numerosity requirement has not been satisfied with regard to it.

III. CONCLUSION

For the afore-referenced reasons, we will grant in part and deny in part the Defendants' Motion to Dismiss as recounted above. (Rec. Docs. 33, 34). We will

grant the Plaintiffs' Motion to Supplement the Complaint (Rec. Docs. 64, 70). Consequently, we will vacate all previously established case management dates and reopen discovery if necessary on the newly added triple celling claim. Additionally, as detailed above and in the order that follows, we will grant in part and deny in part the Plaintiffs' Motion to Certify.

NOW, THEREFORE, IT IS HEREBY ORDERED THAT:

1. The Defendants' Motion to Dismiss (Rec. Doc. 33, as amended by Rec. Doc. 34) is **GRANTED IN PART** and **DENIED IN PART** to the following extent:

    a. The Motion is **DENIED** insofar is it relates to the mootness of the procedural claims of inmates Wyland, Collins, and Wetzel.

    b. The Motion is **GRANTED** insofar is it relates to the mootness of the substantive claims of inmates Wyland, Collins, and Wetzel.

    c. The Motion is **GRANTED** insofar as it relates to the claims of inmates Corely, Anderson, and Holohan.

2. The Plaintiffs' Motion to Supplement (Rec. Doc. 64 as amended by Rec, Doc. 70) is **GRANTED** in its entirety.

3. The Plaintiffs' Motion to Certify (Rec. Doc. 68) is **GRANTED IN PART** and **DENIED IN PART** to the following extent:

   a. The Motion is **DENIED** insofar as it seeks certification of the following claims of the global inmates:

      I. the failure to repair a leaky roof in the female dormitory, the failure to remove mold from the wall in the female dormitory, the failure to repair breached mattresses, the failure to distribute undergarments to inmates upon institutionalization, and the failure to provide inmates with a confidential area in which to conduct legal visits.

   b. The Motion is **GRANTED** with regard to all other claims of the global class.

   c. The Motion is **GRANTED** with regard to all claims of the male subclass.

   d. The Motion is **DENIED** with regard to the female subclass insofar is that class seeks certification on its work release claim.

e. The Motion is **GRANTED** with regard to all other claims of the female subclass.

4. All previously established case management dates are **VACATED**.

5. A telephonic conference call shall be held on March 24, 2009 at 10:00 a.m. Counsel for all parties shall be present and shall be prepared to discuss case management issues, including the need for additional discovery. Counsel for the Plaintiffs shall initiate the call. The Court's phone number is 717-221-3986.

s/ John E. Jones III
John E. Jones III
United States District Judge