

IN THE UNITED STATES DISTRICT COURT

## FOR THE DISTRICT OF IDAHO

WALTER D. BALLA, et. al., )  
vs. )  
Plaintiffs, ) Case No. CV-81-1165-S-BLW  
vs. )  
) **ORDER AND ORDER**  
IDAHO BOARD OF )  
CORRECTIONS, et al., ) **TO SHOW CAUSE**  
Defendants. )  
)

Pending before the Court are the following motions: (1) IDOC Defendants' Motion to Terminate Prospective Relief (Docket No. 635); (2) Plaintiffs' Motion for Extension of Time to File Response (Docket No. 652, 678); (3) Plaintiffs' Motion for Order to Provide Documents (Docket No. 655); (4) Plaintiffs' Motion to Appoint Counsel (Docket No. 657, 675); (5) Plaintiffs' Motion to Postpone Automatic Stay (Docket No. 662); (6) Plaintiffs' Motion for Rule 11 Relief (Docket No. 664); and (7) Plaintiffs' Motion for Discovery (Docket No. 676).

Having reviewed the pending motions and the record in this action, the Court has determined that it will grant Plaintiffs' Motion to Postpone Automatic Stay and Motion to Provide Documents. The Court will also issue an order to show cause concerning the re-appointment of Chase Riveland as the Court's Rule

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706 Expert and the appointment of counsel for the Plaintiffs in this class action.

## **BACKGROUND**

On September 26, 2005, the Honorable James M. Fitzgerald issued an order, denying the IDOC Defendants' Motion to Terminate the injunctive orders placing a population cap at ISCI in Units 9, 10, 11 and 13 and requiring the repair of persistent plumbing problems at ISCI. The Order denying the request to terminate the population cap was based in part on the extensive findings by the Court's Rule 706 expert, Chase Riveland. Mr. Riveland was appointed after the parties jointly agreed he would be the one to investigate the issue of current and ongoing constitutional violations at ISCI. After the Court denied Defendants' Motion to Terminate Prospective Relief , Judge Fitzgerald granted Plaintiffs' request for attorney fees and costs in the amount of \$155,858.68.

Now, less than eighteen months after the Court denied the Defendants' Motion to Terminate Prospective Relief in this action, the IDOC has filed the same motion, seeking substantially the same relief. According to the IDOC Defendants' current request to terminate the population cap, the design capacity for ISCI units 9, 10, 11 and 13 is 318 inmates. The current court-ordered population cap for these ISCI units is 477 inmates, an amount equal to 150% of design capacity. The Defendants seek to terminate the population cap in these units and propose an

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increase in these units to 636 inmates, or 200% of the design capacity. Defendants are not seeking to terminate the injunctive orders which prohibit triple-celling of inmates and placing their mattresses on the floor. *See Docket No. 635-2, p. 3.*

The Court observes that the last time Defendants sought to terminate the population cap, it resulted in extensive litigation, and the Court devoted many hours to this single case. Two visiting judges also spent considerable time and effort resolving this case. Based on the foregoing, the Court is inclined to look for a way to streamline future litigation. The procedures set forth below will reflect this attempt.

### **MOTION TO POSTPONE AUTOMATIC STAY**

On behalf of the class representatives in this action, Barry Searcy filed a motion requesting that the Court postpone the effective date of the automatic stay. In 18 U.S.C. § 3626, the procedures for filing a motion to terminate prospective relief are set forth. It states that “[a]ny motion to modify or terminate prospective relief made under subsection (b) shall operate as a stay during the period—(A)(I) beginning on the 30<sup>th</sup> day after such motion is filed. . . . The court may postpone the effective date of an automatic stay specified in subsection (e)(2)(A) for not more than 60 days for good cause.” 18 U.S.C. § 3626 (e) (2)(A)(I) and (e)(3).

The Court has determined that the report from the Rule 706 expert, Chase

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Riveland, detailing conditions of current and ongoing constitutional violations, combined with the short time span between the denial of the previous motion and the filing of the present motion, demonstrate that good cause exists to postpone the effective date of an automatic stay. *See Final Report of Chase Riveland, Appendix A to Docket No. 585.*

Based on the foregoing, Plaintiffs' Motion to Postpone the Effective Date of the Stay will be granted. Therefore, the earliest date the automatic stay can go into effect is May 17, 2007.

**ORDER TO SHOW CAUSE – RULE 706 EXPERT**

The Court also issues notice of its intent to reappoint Chase Riveland as the Court's Federal Rule of Evidence 706 expert. During his prior appointment, the parties submitted a proposed set of directions to guide Mr. Riveland's work in the case. The following set of directives were given to Mr. Riveland:

1. Whether the current staffing at ISCI was adequate to provide personal safety to the inmates and employees and protect property at the prison;
2. Whether adding additional inmates would increase the potential for violent acts and personal attacks at ISCI;
3. Whether there was adequate plumbing facilities (toilets, sinks, and showers) to accommodate additional inmates at ISCI;

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4. Whether prison officials had adequate maintenance staff to timely service plumbing facilities;
5. Whether the square footage per inmate in cells, day rooms, and other common areas was adequate;
6. Whether access to recreational areas, including the gymnasium, ball fields, and weight rooms would be affected by the population increase;
7. Whether an increase in inmate population would affect prison officials' ability to protect the physical, mental and emotional health of inmates at ISCI;
8. Whether access to medical care, psychiatric care, treatment programs, educational programs, jobs, the resource center, and other inmate benefits would be impacted through an increased inmate population at ISCI; and
9. Whether the potential for increased noise levels would result from the population increase at ISCI.

The parties also submitted a proposed summary of the Eighth Amendment standard that would guide Mr. Riveland's expert opinion, which the Court adopted. The Court issues notice of its intent to adopt the same guidelines and directives as previously provided to Mr. Riveland.

The Court will request that Mr. Riveland prepare a report on an expedited basis, and the IDOC Defendants will be ordered to pay for Mr. Riveland's expert

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fees. *See Fed. R. Ev.* 706 (compensation of the Rule 706 expert “shall be paid by the parties in such proportion and at such time as the court directs.”). Defendants may request that a cap be placed on the fees Mr. Riveland will incur in preparing his report.

### **ORDER TO SHOW CAUSE – ATTORNEY FEES**

The Court also issues an order to show cause on the payment of attorney fees and costs for the Plaintiffs in this action. Because these injunctive orders arise from a class action lawsuit, the Court must appoint counsel to represent the interests of the class members. The Court previously appointed the law firm of Stoel Rives to represent the inmate class, and the law firm worked on the litigation for almost two years without being paid for their work. Ultimately, Stoel Rives was awarded at least a portion of the extensive attorney fees that were incurred by Plaintiffs in successfully defending against the termination motion.

Because representing a class of inmates is difficult and time consuming, the Court issues notice of intent to appoint counsel for Plaintiffs and notice of intent to order Defendants to pay the attorney fees and costs to Plaintiffs’ counsel on a monthly basis. *See Webb v. Ada County*, 285 F.3d 829, 834-35 (9th Cir. 2002)(holding that post-judgment monitoring and enforcement are compensable without necessity of proving a new constitutional violation); *Cody v. Hillard*, 304

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F.3d 767, 776 (8th Cir. 2002)(approving fees for defending against a motion to terminate because “the class’s effort to prolong the efficacy of the remedial decree was time spent ‘enforcing’ that decree under the statute.”).

The Court will attempt to locate counsel for Plaintiffs and in the event the class representatives are able to locate counsel through their own efforts, they shall notify the Pro Se Unit, U.S. Courthouse, 550 W. Fort Street, Boise, ID 83724.

### **HEARING ON ORDERS TO SHOW CAUSE**

In the event the parties request a hearing on the orders to show cause, they shall notify the Pro Se Unit within the next ten (10) days. A hearing on the orders to show cause shall be held no later than April 13, 2007. The parties may also submit briefing in response to the Court’s orders to show cause. The supplemental briefing from Defendants shall be submitted on or before March 30, 2007. Plaintiffs will be given an opportunity to provide supplemental briefing when counsel has been appointed to represent them.

### **OTHER PENDING MOTIONS**

Plaintiffs’ filed a Motion for Extension of Time to File Response to Defendants’ Motion to Terminate Prospective Relief, and Plaintiffs’ motion will be granted. A response to Defendants’ motion will be filed after counsel is appointed

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for the inmate class.<sup>1</sup>

Plaintiffs' class representative, Barry Searcy, filed a Motion for Order to Provide Documents, requesting that the class representatives be given copies of the entire Motion to Terminate Prospective Relief. The Court will grant Plaintiff Searcy's motion, and to the extent Defendants have not previously provided copies of the entire Motion to the class representatives, they shall do so within five (5) days of this Order's date.

Inmate Lance Wood also filed a Motion for Rule 11 Relief, accusing Defendants of filing a "frivolous and fraudulent" motion in this action. He requests that the Court deny Defendants' Motion to Terminate Prospective Relief on this basis. It does not appear that inmate Wood is a class representative in this action, and the Court will order that all future motions be filed only by a class representative until counsel is appointed for Plaintiffs. Once counsel is appointed for Plaintiffs, they can review the Fed. R. Civ. Proc. 11 issue with their counsel.

Finally, Plaintiffs filed a motion requesting the opportunity to conduct discovery in this matter. The Court will defer a ruling on this issue until after

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<sup>1</sup> Inmate Raymond Roles filed the Motion for Extension of Time, and it does not appear that Mr. Roles is a class representative in this action. In the future, the Court will only accept motions from previously designated class representatives. The Court has already received numerous letters and other documents from inmates in this action, and the Court's record will be maintained in a more orderly and concise manner through a limitation on filings from inmates.

counsel is appointed for Plaintiffs.

**ORDER**

NOW THEREFORE IT IS HEREBY ORDERED that Plaintiffs' Motion for Extension of Time to File Response (Docket No. 652, 678) is GRANTED as set forth above.

IT IS FURTHER HEREBY ORDERED that Plaintiffs' Motion for Order to Provide Documents (Docket No. 655) is GRANTED as set forth above.

IT IS FURTHER HEREBY ORDERED that Plaintiffs' Motion to Appoint Counsel (Docket No. 657, 675) is GRANTED. The Court will only accept motions from the class representatives in this action, until the time counsel is appointed, and thereafter, only Plaintiffs' counsel shall file motions and other documents with the Court on their behalf.

IT IS FURTHER HEREBY ORDERED that Plaintiffs' Motion to Postpone Automatic Stay (Docket No. 662) is GRANTED as set forth above. The automatic stay shall not take effect prior to May 17, 2007.

IT IS FURTHER HEREBY ORDERED that Plaintiffs' Motion for Rule 11 Relief (Docket No. 664) is DENIED without prejudice.

IT IS FURTHER HEREBY ORDERED that Plaintiffs' Motion for

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Discovery (Docket No. 676) is DENIED without prejudice to re-filing it.

IT IS FURTHER HEREBY ORDERED that the Defendants shall respond to the orders to show cause as set forth above on or before March 30, 2007 and a hearing on these orders shall be held on or before April 13, 2007. If the parties request a hearing, they shall contact the Pro Se Unit at 334-1172.

DATED: **March 16, 2007**

A handwritten signature in black ink that reads "B. Lynn Winmill".

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Honorable B. Lynn Winmill  
Chief U. S. District Judge

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