IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF MISSOURI SOUTHERN DIVISION

STEPHANIE GASCA, et al.,	)	
	)	
Plaintiffs,	)	
	)	
v.	)	Case No. 17-cv-04149-SRB
	)	
ANNE PRECYTHE, Director of the Missouri, Department of Corrections, et al.,	)	
	)	
Defendants.	)	

ORDER

Before the Court is Defendants' Motion to Decertify the Class. (Doc. #293). For the following reasons the motion is DENIED.

I. Background

This lawsuit challenges the constitutionality of the parole revocation policies, procedures, and practices of the Missouri Department of Corrections and its Division of Probation and Parole. After the Court denied without prejudice Plaintiffs' initial motion for class certification, Plaintiffs conducted comprehensive discovery and filed a renewed motion for class certification. Defendants did not object to the renewed motion, and after conducting a rigorous analysis, the Court certified this matter as a class action pursuant to Federal Rule of Civil Procedure 23(b)(1)(A) and (b)(2). (Doc. #132, pp. 2–3). The Plaintiff class, defined as "all adult parolees in the state of Missouri who currently face, or who in the future will face, parole revocation proceedings," seeks injunctive and declaratory relief. (Doc. #132, p. 3).

Defendants have conceded that "the policies that existed at the time Plaintiffs filed their Amended Class Action complaint did not satisfy [Due Process requirements]" and that Defendants have taken "substantial corrective measures to remedy these shortcomings." (Doc.

#140, p. 1). Defendants consented to entry of summary judgment in Plaintiffs' favor on the amended class action complaint, and the Court granted Plaintiffs' motion for summary judgment. (Doc. #146). Since entry of summary judgment, the parties have been unable to agree on remedy.[1] Ahead of the evidentiary hearing regarding remedy conducted on June 10–11, 2020, Defendants filed the instant motion to decertify the class. The motion is now ripe for ruling.

II. Legal Standard

Rule 23 requires that a proposed class satisfy all four prerequisites of Rule 23(a) and at least one of the provisions of Rule 23(b) to be certified. *Comcast Corp. v. Behrend*, 569 U.S. 27, 32 (2013); *Blades v. Monsanto Co.*, 400 F.3d 562, 568–69 (8th Cir. 2005). Relevant to the instant motion, Rule 23(a) contains four requirements applicable to all proposed classes: "(1) the class is so numerous that joinder of all members is impracticable; (2) there are questions of law or fact common to the class; (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class; and (4) the representative parties will fairly and adequately protect the interests of the class." Fed. R. Civ. P. 23(a). District courts must engage in a rigorous analysis to determine whether the prerequisites of Rule 23 have been satisfied. *Gen. Tel. Co. of Sw. v. Falcon*, 457 U.S. 147, 161 (1982).

"The Court has an ongoing duty to assure that the class claims in this action are certifiable under Federal Rule 23." *E. Maine Baptist Church v. Union Planters Bank, N.A.*, 244 F.R.D. 538, 540 (E.D. Mo. 2007) (citing *Petrovic v. Amoco Oil Co.*, 200 F.3d 1140, 1145 (8th Cir. 1999); *Briggs v. Anderson*, 796 F.2d 1009, 1017 (8th Cir. 1986) (citing *Gen. Tel. Co.*, 457 U.S. at 160)). "Even after a certification order is entered, the judge remains free to modify it in

[1] Relevant not to this motion but to the issue of remedy, Defendants argue they have corrected the constitutional shortcomings of their policies and procedures, while Plaintiffs disagree.

the light of subsequent developments in the litigation." *Day v. Celadon Trucking Servs., Inc.*, 827 F.3d 817, 830 (8th Cir. 2016) (quoting *Gen. Tel. Co.*, 457 U.S. at 160 (footnote omitted)).

III. Discussion

The Court notes as a preliminary matter that Defendants did not object to class certification and consented to entry of summary judgment on the amended class action complaint. Now, at the final stage of the proceedings (determination of remedy), Defendants argue the class should be decertified because the class and its representatives lack commonality, standing, typicality, adequacy, and cohesiveness. As discussed below, Defendants offer no new facts or changes in circumstance that warrant decertification of the class.[2] Additionally, Defendants cite no case in which a court granted a motion for decertification after Defendants did not oppose class certification, agreed to class notice and dissemination thereof, consented to entry of summary judgment on the class action complaint, and failed to offer any changes in circumstance supporting their motion for decertification.

At the class certification stage, this Court conducted a rigorous analysis and found that the proposed class satisfies the Rule 23(a) requirements of numerosity, commonality, typicality, and adequacy. The Court further found that litigating class members' claims individually would "create a risk of inconsistent or varying adjudications . . . that would establish incompatible standards of conduct" for Defendants' parole revocation proceedings. Fed. R. Civ. P. 23(b)(1)(A). The Court found that Defendants' parole revocation policies and procedures "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). As Plaintiffs aver, "the

[2] Many of the arguments in Defendants' reply brief relate to evidence presented at the evidentiary hearing on remedy and do not apply to the class certification analysis.

same facts and rationale on which the Court based its order granting class certification remain today." (Doc. #315, p. 1).

A. Commonality

Defendants argue that the class lacks commonality because Plaintiffs raise concerns with multiple parole revocation policies and procedures as opposed to a single policy or practice. Plaintiffs stress that "[i]n this case, the common question of fact and law linking all class members is and has always been whether Defendants' policies, procedures, and customs ensure a constitutionally-adequate parole revocation process for all who are or will be considered for parole revocation," which aligns with the "single-count Complaint [that] raised at least one common question capable of class-wide resolution." (Doc. #315, pp. 6–7).

The Court finds no basis for decertifying the class on commonality grounds. As an initial matter, there has been no change in common question(s), i.e., the constitutionality of Defendants' parole revocation policies and procedures, since the class was certified without objection by Defendants and since the entry of summary judgment, to which Defendants consented. Even so, Defendants argue that Plaintiffs' brief filed ahead of the evidentiary hearing on remedy contains "commonality concerns in this case [that] are more numerous than ever." (Doc. #294, p. 10). Defendants go on to enumerate the "concerns" raised by Plaintiffs in their brief, yet each of the enumerated "concerns" was set forth in Plaintiffs' amended class action complaint and renewed motion for class certification, to which Defendants offered no objection. Defendants then argue that they "expected the issues to narrow after motion practice," despite the fact that Defendants consented to entry of summary judgment on the class action complaint and made no objection to dissemination of class certification notice. Defendants claim Plaintiffs' numerous complaints about due process violations prevent commonality, although these are the same issues raised in

the Supreme Court cases of *Morrissey v. Brewer*, 408 U.S. 471 (1972) and *Gagnon v. Scarpelli*, 411 U.S. 778 (1973).

Defendants' attempt to now portray the common issue(s) in this case as uncommon in this very late stage of the proceedings, particularly considering their consent to class treatment and summary judgment, is unmeritorious.[3] Finding no new facts or changes in circumstance that did not exist at the time of class certification, the Court finds decertification is unwarranted. *See Day*, 827 F.3d at 830 (quoting *Gen. Tel. Co.*, 457 U.S. at 160) ("Even after a certification order is entered, the judge remains free to modify it *in the light of subsequent developments in the litigation*.") (emphasis added).

B. Breadth of Class

Defendants argue the class is overbroad because "it contains numerous members who have no cognizable injury and lack standing." (Doc. #294, p. 12). Defendants argue that, for example, this case involves, "the availability of counsel for parole hearings, but not every parolee wants counsel to be provided, . . . so the class would contain many members who have no cognizable injury and no standing to sue." (Doc. #294, p. 13). Plaintiffs correctly note that

[3] The Court also notes that, as Plaintiffs assert, Defendants do not deny "that all Class members are subject to the same parole revocation process governed by Defendants' written policies and procedures and unwritten customs." (Doc. #315, p. 5). Instead, Defendants argue "commonality is lacking because the constitutional violations are too numerous." (Doc. #315, p. 5). However, Plaintiffs are not required to cap their number of common questions at one. The Eighth Circuit has stated that "a single common question 'will do' for purposes of Rule 23(a)(2)," *Ebert v. General Mills, Inc.*, 823 F.3d 472, 478 (8th Cir. 2016) (citing *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338, 350 (2011)), not that more than a single common question precludes a finding of commonality. Moreover, the Court agrees with Plaintiffs' assertion that "[a]lthough the overarching question [of whether Defendants' policies, procedures, and customs ensure a constitutionally-adequate parole revocation process for all who are or will be considered for parole revocation] necessarily entails sub-questions, [] Plaintiffs' claims have 'a common answer capable of resolution in one stroke[.]'" (Doc. #315, pp. 6–7) (quoting *Luiken v. Domino's Pizza, LLC*, 705 F.3d 370, 377 (8th Cir. 2013)). This is so because an order crafting injunctive relief as it relates to the constitutionality of Defendants' policies and procedures will resolve the single claim for the entire class. *See Dukes*, 564 U.S. at 350 (quotation marks and citation omitted) (Class claims must "depend upon a common contention" that "is capable of class wide resolution," such that "determination of its truth or falsity will resolve an issue that is central to the validity of each one of the claims in one stroke.") ("The key to the (b)(2) class is 'the indivisible nature of the injunctive or declaratory remedy warranted—the notion that the conduct is such that it can be enjoined or declared unlawful only as to all of the class members or as to none of them.'").

while Defendants now argue that the class is overbroad, Defendants previously consented to class certification, submitted a joint proposed class notice to the Court, and agreed with Plaintiffs on the process for distributing notice to all class members. Plaintiffs also argue that they "do not have to establish that each class member has standing to bring a due process claim in order to satisfy Rule 23's requirements." (Doc. #315, p. 8).

As Plaintiffs correctly assert, Defendants have already conceded that their "policies and practices expose all parolees to an injury, i.e., violation of their due process rights." (Doc. #315, p. 8). Indeed, "'federal courts do not require that each member of a class submit evidence of personal standing,' so long as each member may allege injury." *Cope v. Let's Eat Out, Inc.*, 319 F.R.D. 544, 552 (W.D. Mo. 2017) (quoting *Bouaphakeo v. Tyson Foods, Inc.*, 593 Fed. Appx. 578, 585 (8th Cir. 2014)); *see also* Fed. R. Civ. P. 23(b)(2) advisory committee's note to 1966 amendment ("Action or inaction is directed to a class within the meaning of this subdivision even if it has taken effect or is threatened only as to one or a few members of the class, provided it is based on grounds which have general application to the class."); *Hernandez v. Cty. of Monterey*, 305 F.R.D. 132, 157 (N.D. Cal. 2015) ("While results of exposure may vary . . . each inmate suffers the same constitutional or statutory injury when exposed to [the same] polic[ies] or practice[s].").[4] The class definition has remained the same since it was defined in the class certification order. Defendants' policies, practices, and procedures remain applicable to the entire class. For these reasons, decertification for lack of standing is unwarranted.

[4] Defendants' argument that members of the class lack standing because some of the policies, procedures, or practices did or do not affect them goes more to the commonality prerequisite. The Court notes that the commonality requirement "imposes a light burden on the plaintiff seeking class certification and does not require commonality on every single question raised in a class action." *In re Aquila ERISA Litig.*, 237 F.R.D. 202, 207 (W.D. Mo. 2006) (citing *DeBoer v. Mellon Mortg. Co.*, 64 F.3d 1171, 1174 (8th Cir. 1995)); *Paxton v. Union Nat. Bank*, 688 F.2d 552, 561 (8th Cir. 1982) (citation omitted) ("The rule does not require that every question of law or fact be common to every member of the class.").

C. Typicality and Adequacy

Defendants argue the class should be decertified because the "class representatives have different claims [from those of the class members] and will be absent at trial [on remedy]." (Doc. #294, p. 14). Plaintiffs argue that the typicality and adequacy requirements were satisfied at the class certification stage and continue to be met.

The Court reemphasizes that while Defendants argue "[t]his case has had typicality and adequacy concerns from the outset," (Doc. #294, p. 15), Defendants did not oppose Plaintiffs' renewed motion for class certification, agreed to class notice and dissemination thereof, and consented to entry of summary judgment on the amended class action complaint. Nonetheless, the named Plaintiffs need not have suffered the same exact injuries as class members. As the Court noted above, the question of the constitutionality of Defendants' policies and procedures is common to the entire class, and potential injunctive relief will remedy the constitutional violations that apply to the class. *See DeBoer*, 64 F.3d at 1174 (citation omitted) (finding named plaintiff's claims "typical of the remainder of the class given the nature of the injunctive relief sought" and noting "[t]he burden of demonstrating typicality is fairly easily met so long as other class members have claims similar to the named plaintiff"); *Donaldson v. Pillsbury Co.*, 554 F.2d 825, 831 (8th Cir. 1977) ("When the claim arises out of the same legal or remedial theory, the presence of factual variations is normally not sufficient to preclude class action treatment.").

Defendants' argument that there is no typicality or adequacy because Plaintiffs did not call the named plaintiffs at "trial" is equally unconvincing. Defendants fail to recognize that a trial on the merits never occurred in this case because Defendants consented to summary judgment. The "trial" to which Defendants refer was an evidentiary hearing on remedy. Defendants cite no case in which a court found a lack of typicality or adequacy because Plaintiffs

did not call the named plaintiffs as witnesses after the merits had been decided at a hearing on remedy. For these reasons, decertification for lack of typicality and adequacy is unwarranted.

D. Cohesiveness

Defendants argue that for all the reasons already discussed, there is no cohesiveness among class members as required for certification under Rule 23(b)(2). Plaintiffs argue that the class was cohesive when the class was certified and remains cohesive now. Defendants offer the Court no new facts that did not exist at the time of class certification to warrant decertification on the basis of cohesiveness. *See Day*, 827 F.3d at 830. Nevertheless, the class remains cohesive. Injunctive relief concerning Defendants' policies and procedures governing parole revocation proceedings will "provide relief to each member of the class," *Ebert*, 823 F.3d at 480 (quoting *Dukes*, 564 U.S. at 360), all of whom are or will be subjected to the policies and procedures. *See* 7AA Charles A. Wright & Arthur R. Miller, 7AA Federal Practice & Procedure Civil § 1776.1 (3d ed. 2020) ("[A] common use of Rule 23(b)(2) is in actions brought to challenge various practices or rules in the prisons on the ground that they violate the Constitution."). For these reasons, decertification based on a lack of cohesiveness is unwarranted.

IV. Conclusion

Accordingly, Defendants' Motion to Decertify the Class (Doc. #293) is DENIED.

IT IS SO ORDERED.

/s/ Stephen R. Bough
JUDGE STEPHEN R. BOUGH
UNITED STATES DISTRICT COURT

DATED: August 5, 2020