UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

WESTERN DIVISION

MARY AMADOR, et al.,

Plaintiffs,

vs.

SHERIFF LEROY D. BACA, et al.,

Defendants.

CASE NO. 10-CV-1649-SVW

ORDER GRANTING PLAINTIFF'S RENEWED MOTION FOR CLASS CERTIFICATION [321] [313]

On October 22, 2010, Plaintiff's filed the first motion to certify a class in this case. Since then, there have been six more rounds of briefing concerning certifying or decertifying the proposed class and seven hearings or status conferences on the same issue—the last one on November 14, 2016. The Court has reached the point where it needs to rule, decisively, on the precise definition of this class.

I. INTRODUCTION

The Court set forth the underlying facts in *Amador v. Baca*, 299 F.R.D. 618, 624-28 (C.D. Cal. 2014). The Court also discussed the change of conditions over time in its order decertifying the class. *See* dkt. 312 at 5. In that order, the Court granted Plaintiffs leave to file a renewed motion to certify a damages class on the issue of liability pursuant to Rule 23(c)(4) in order to take into account these varying changes over time. *Id.* at 6. Plaintiffs filed the renewed motion for certification on September 13, 2016. Dkt. 321.

Having considered the briefing for that motion, as well as previous arguments and orders over the past six years, the Court again finds the class suitable for certification. To the extent this order is inconsistent with any previous findings that a certain characteristic of the search was common or uncommon, predominant or not predominant, or otherwise relevant to this analysis, this order controls.

II. CLASS DEFINITION

A significant policy change occurred in July, 2011, that creates a substantial distinction between the women searched from March, 2008–July, 2011, and from July, 2011–January 1, 2015. In July, 2011, some guards stopped the common policy of searching both lines of inmates simultaneously. Dkt. 321 at 17. This Court believes whether the lines were searched simultaneously or one-at-a-time creates a critically different analysis for liability. The Court does not find Plaintiff's proposed class structure satisfactory because it overlaps these time periods despite the change in conditions. Thus, this Court will certify two *distinct* classes: (1) March, 2008 – July, 2011 "Simultaneous search class", (2) July, 2011 – January 1, 2015 "One-line-at-a-time search class".

A. CLASS #1: SIMULTANEOUS SEARCH CLASS, MARCH, 2008–JULY, 2011

The events common to this class are that two lines of women were searched in Bus Bay #3, against opposite walls, and directed to face each other. The groups ranged upwards of 60 women. They were told to undress and a guard would search their exposed top half, including underneath breasts, armpits, and rolls of fat. During this time, the female on the opposite wall was facing forward, viewing the search occurring. Similarly, each female had to watch while this search was done to the person across from them and be exposed to that female's private body parts. There was also nothing preventing the women from viewing searches to their left and right.

After the search of the upper part of the body, the visual body cavity ("vbc") inspection occurred. In this inspection, the women were instructed to remove their underwear, turn around, bend at the waist, and look through their legs during this search. The women were ordered to manually spread their labia to expose their vaginal opening. Both lines did this at the same time, so that the women would view the female across from them in the same position, with their genitals exposed.

When the women undressed, the clothes were placed directly on the ground. The women were barefoot on a porous, concrete slab.

1. Weather Subclass

This subclass will include women in class #1 who were also subjected to temperatures of 77 degrees or lower.

2. Menstruation Subclass

This subclass will include women in class #1 who were menstruating at the time the search occurred. There were additional policies targeted towards menstruating women: in front of the group they would be ordered to (1) self-identify that they were currently menstruating, (2) remove their tampon or sanitary pad, and (3) insert a new one.

B. CLASS #2: ONE-LINE-AT-A-TIME SEARCH CLASS, JULY, 2011 – JANUARY 1, 2015

The events common to this class are that two lines of women were searched in Bus Bay #3, against opposite walls, and directed to face the wall. The group size was limited to 24 women at a time (except for the subclass, noted below). Then, one line at a time would face forward and undress. Opposite them would be a female facing the wall so that no female would directly view the female across from them—except their backside. There was nothing preventing the women from viewing searches to their left and right.

The search itself was essentially the same (checking underneath breasts, armpits, and rolls of fat). The vbc inspection was also one line at a time and otherwise essentially the same (women were told to face the wall, bend at the waist, manually spread their labia, and look between their legs). During the vbc inspection the women would not be viewing the female across from them in the *same* position, rather the female across from them would be facing the wall.

The women placed their clothes on tables (except for the subclass, noted below). They were barefoot on a porous, concrete slab.

1. Clothes and Group Size Subclass

Women in class #2 who were searched between July 2011 – March 2013 had the following common conditions between them: (1) searched in groups upwards of 60, and (2) clothes were put directly on the floor.

2. Weather Subclass

This subclass will include women in class #2 who were also subjected to temperatures of 77 degrees or lower.

3. Menstruation Subclass

This subclass will include women in class #2 who were menstruating at the time the search occurred. There were additional policies targeted towards menstruating women: in front of the group they would be ordered to (1) self-identify that they were currently menstruating, (2) remove their tampon or sanitary pad, and (3) insert a new one.

III. LEGAL STANDARD

A party seeking class certification must satisfy two requirements. *See Zinser v. Accufix Research Inst., Inc.*, 253 F.3d 1180, 1186 (9th Cir. 2001), *amended by* 273 F.3d 1266 (9th Cir. 2001). First, the moving party must show that the proposed class meets four criteria: (1) the members of the proposed class must be so numerous that joinder of all claims would be impracticable ("numerosity"); (2) there must be questions of law and fact common to the class ("commonality"); (3) the claims or defenses of the representative parties must be typical of the

claims or defenses of absent class members ("typicality"); and (4) the representative parties must fairly and adequately protect the interests of the class ("adequacy"). Fed. R. Civ. P. 23(a).

Second, the moving party must demonstrate that the Class fulfills the conditions of at least one of the three subdivisions of Rule 23(b). To qualify for certification under Rule 23(b)(3) this subsection, a class must satisfy two conditions: (1) common questions of law or fact must "predominate over any questions affecting only individual members," and (2) class resolution must be "superior to other available methods for the fair and efficient adjudication of the controversy." Fed. R. Civ. P. 23(b)(3). "The party seeking certification bears the burden of showing that each of the four requirements of Rule 23(a) and at least one requirement of Rule 23(b) have been met." *Zinser*, 253 F.3d at 1186.

When appropriate, the Court may also certify a class as to a particular issue. Fed. R. Civ. P. 23(c)(4). Although "courts and commentators are sharply split on when issue certification is proper," the Ninth Circuit endorses 23(c)(4) liability classes. 2 William Rubenstein, et al., Newberg on Class Actions § 4:91 381-82 (citing *Valentino v. Carter-Wallace, Inc.*, 97 F.3d 1227 (9th Cir. 1996)); *see also Jiminez v. Allstate Ins. Co.*,765 F.3d 1161, 1166-69 (9th Cir. 2014). A court may also create subclasses, each of which is treated as a class and subject to the same requirements as one. *Betts v. Reliable Collection Agency, Ltd.*, 659 F.2d 1000, 1005 (9th Cir. 1981).

A party seeking to certify a class may not merely rest on his pleadings. Rather, "[a] party seeking class certification must affirmatively demonstrate his compliance with the Rule—that is, he must be prepared to prove that there are ***in fact*** sufficiently numerous parties, common questions of law or fact, etc." *Wal–Mart Stores, Inc. v. Dukes*, 564 U.S. 338, 350 (2011) (emphasis added). Thus, a trial court is expected to engage in "rigorous analysis" to determine if the moving party has discharged its burden. *Wal–Mart*, 564 U.S. at 350–51 (internal citations omitted). This analysis often "will entail some overlap with the merits of the plaintiff's underlying claim." *Id.* at 351.

IV. DISCUSSION

A. RULE 23(a) REQUIREMENTS

The Defendants do not dispute the elements of numerosity, typicality, and adequacy. As for commonality, the parties dispute whether certain aspects of the search are sufficiently common among all class members.

1. Numerosity

The exact number of the class is unknown, but is estimated to be in the tens of thousands. *See* dkt. 284-34, Kriegler Declaration. This Court agrees that a class which expands seven years in which hundreds of women were strip searched each month constitutes a class "so numerous that joinder of all members is impracticable." Fed. R. Civ. P. 23(a)(1).

2. Typicality

"[R]epresentative claims are 'typical' if they are reasonably co-extensive with those of absent class members; they need not be substantially identical." *Hanlon v. Chrysler Corp.*, 150 F.3d 1011, 1020 (9th Cir. 1998). The named Plaintiffs are typical representatives of Class #1 since they were searched between March, 2008 – July, 2011 and were subjected to the same policies that the class is challenging. Furthermore, at least one of the named Plaintiffs is typical of each subclass. *See, e.g.*, dkt. 284-42, Cholewiak Decl. ¶ 24 (searched while menstruating), dkt. 284-52, Madrid Decl. ¶¶ 17, 22 (searched while menstruating; searched in cold conditions).

The Court recognizes that by creating two primary classes the Plaintiffs are left without a named representative of Class #2, or any of those subclasses, since none of the named Plaintiffs state in their declaration that they were searched between July, 2011 – January 1, 2015. *See* attachments to dkt. 284. Thus, this Court will allow Plaintiffs fourteen (14) days to amend the pleadings to cure this defect and add name Plaintiffs to represent this class if able.

3. Adequacy

"The Ninth Circuit has held that representation is 'adequate' when counsel for the class is qualified and competent, the representative's interests are not antagonistic to the interests of absent class members, and it is unlikely that the action is collusive." *Fragala v. 500.com*, 2015 WL 12513580, *9 (C.D. Cal. 2015) (*citing In re Northern Dist. Of Cal., Dalkon Shield IUD Prod. Liab. Litig.*, 693 F. 2d 847, 855 (9th Cir. 1982)). Further, "the class representative must have a sufficient interest in the outcome of the case to ensure vigorous advocacy." *Fragala*, 2015 WL 12513580 at *9 (*citing Riordan v. Smith Barney*, 113 F.R.D. 60, 64 (N.D. Ill. 1986)).

Defendants do not contest the adequacy of the named Plaintiffs or Plaintiffs' counsel. The Court finds that the named Plaintiffs have sufficiently participated in these proceedings and have shown a willingness for vigorous advocacy. Further, the Court finds that Plaintiffs' counsel is qualified, competent, and adequate to represent the class and has already shown a willingness to do so vigorously over the past six years. There are no interests antagonistic to absent class members.

As stated above, the Court recognizes there are no adequate named Plaintiffs for Class #2, or corresponding subclasses, and reiterate that the Plaintiffs have an opportunity to amend the pleadings accordingly.

4. Commonality

"[I]n a civil-rights suit, . . . commonality is satisfied where the lawsuit challenges a system-wide practice or policy that affects all of the putative class members." *Armstrong v. Davis*, 275 F.3d 849, 868 (9th Cir. 2001) (citing *LaDuke v. Nelson*, 762 F.2d 1318 (9th Cir. 1985), abrogated on other grounds by *Johnson v. California*, 543 U.S. 499, 504-05 (2005)).

Several of the elements included in the class definitions above have previously been found by this Court to satisfy the commonality requirements. The standard policy of the search was common to all class members: they would be placed in groups, ordered to line up, and strip searched without any individual privacy. This was the *policy* of the CRDF and thus commonality is satisfied.

Some aspects, however, are in dispute. Plaintiffs *again* ask this Court to include "outdoor conditions" in the class definition, which is simply a relabeling of their previously dismissed request to include unsanitary conditions. This Court does not find the existence of birds, bird feathers, ants, or bus fumes to be common enough to be included in the class. Plaintiffs argue that whether an inmate "personally experienced insects or birds during a given search goes to injury and damages, not liability for a class wide practice." Dkt. 321 at 24. This is incorrect. The jury question is whether the policies common to each search were unreasonable. This inquiry takes into account the totality of circumstances. Thus, a jury could find that the common policies set forth in the class definition are constitutional, but that an individual female breathing in bus fumes (or being subjected to ants and birds) makes that individual's search unconstitutional. Since each element not included in a common policy could affect *liability*, there would be no common answer to "was my search unreasonable?" if these elements were included in the class definition.

Similarly, the policies towards menstruating women do not apply to the class as a whole. Plaintiffs rely on *Torres v. Mercer Canyons Inc.*, 835 F.3d 1125 (9th Cir. 2016). In that case a farm operator withheld information from employees on the availability and pay rate of H-2A work in violation of migrant workers protection laws. *Id.* at 1130. Defendants argued there was no commonality because some workers would not have benefited from this information and thus were not injured by the policy. *Id.* at 1136. The Ninth Circuit held this does not defeat commonality because they were all subjected to the same *policy*, despite the variance in *injury*. *Id.* This case is distinguishable from *Torres*. The issue is not just that some women were *uninjured* from the policies surrounding menstruation, but that non-menstruating women were never even subjected to this *policy*. If a female was not menstruating they did not remove their tampon/sanitary pad and replace it. This is not just an issue of injury or damages, but goes straight to liability. A reasonable jury could find that the group strip searches were constitutional in general, but that the extra policies applied to menstruating women make their searches unconstitutional. Thus, again, there would be no common answer to the question "was my search unreasonable?" However, each woman who was searched while menstruating was subjected to the same policies and thus would have a common answer to a common question. Thus, this Court certifies a subclass for these women.[1]

Lastly, there is a subclass for women who experienced temperature at or below 77 degrees Fahrenheit—the temperature requested by Plaintiffs.[2] *See* dkt. 321 at 18. If further evidence comes forth suggesting a different temperature is more appropriate, the Plaintiffs can petition the Court to amend the class definition accordingly. However, the Court does not believe it would be manageable to present evidence to a jury of the deleterious effects of several different temperatures and let them decide which temperature, if any, is too cold to conduct a reasonable strip search. One temperature will be given to the jury and the jury can return a common answer for all women searched below that temperature of whether it was unreasonably cold or not.

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[1] Further, the Court is satisfied that women can self-identify via an affidavit as menstruating during the time of the search, as did the named Plaintiffs in this case.

[2] As is true with any issue, Defendants may be able to introduce evidence that the weather on any given day cannot be reliably ascertained. The Court does not decide on that issue here.

B. RULE 23(b)(3) REQUIREMENTS

To certify a class under Rule 23(b)(3) the Plaintiff must show that common questions of fact or law predominate over individual issues, and that a class action is the superior method to adjudicate the controversy. Fed. R. Civ. P. 23(b)(3).

1. Predominance

"The Rule 23(b)(3) predominance inquiry asks the court to make a global determination of whether common questions prevail over individualized ones." *Torres*, 835 F.3d 1125 at 1134. "[A] common question is one where the same evidence will suffice for each member to make a prima facie showing [or] the issue is susceptible to generalized, class-wide proof." *Id.* (internal citations and quotation marks omitted). Further, "more important questions apt to drive the resolution of the litigation are given more weight in the predominance analysis over individualized questions which are of considerably less significance to the claims of the class." *Id.*

This Court finds the question of whether the underlying CRDF policies of strip searching female inmates in groups and without individualized privacy to be the predominant inquiry for purposes of the Rule 23(c)(4) Damages Class. While individual differences in search conditions occurred, such as the use of vulgar language by prison guards, unsanitary conditions, etc. The *gravamen* of the class claim is that the policies—targeted against the entire class—are unconstitutional. Defendants argue that the Court "would be required to make an individualized inquiry into the search-related circumstances of ever class member to determine the merits of each claim." Dkt. 323 at 21. This is incorrect. As a class certified under Rule 23(c)(4), all that will need to occur is a description of the *policies* common to each class, as set forth above, and then the jury can provide a common answer that would apply to each class member as to whether these policies were reasonable.

2. Superiority

To establish superiority, the Court must consider:

> (A) the class members' interests in individually controlling the prosecution or defense of separate actions;
> (B) the extent and nature of any litigation concerning the controversy already begun by or against class members;
> (C) the desirability or undesirability of concentrating the litigation of the claims in the particular forum; and
> (D) the likely difficulties in managing a class action.

Fed. R. Civ. P. 23(b)(3)(A)–(D). These factors are non-exhaustive. *Local Joint Exec. Bd. of Culinary/Bartender Trust Fund v. Las Vegas Sands, Inc.*, 244 F.3d 1152, 1163 (9th Cir. 2001). Defendants have put forth no argument that individual class members would have an interest in prosecuting this case through separate actions. The Court sees no reason for this to be the case, and believes the class members would benefit from class treatment. Further, there is no known current litigation already pending by class members

on this issue. Concentrating the litigation in this particular forum is highly desirable as all the relevant events took place within the Central District of California. Lastly, though managing a class of this size and with several subclasses will not be easy, it will also not be unduly difficult. All of the subclasses include additional elements that may make the search less reasonable, however if a fact-finder finds the elements common to each primary class to already create a constitutional violation then none of the subclasses need to be litigated on the issue of liability. Similarly, the direction of litigation is manageable: the least problematic policies common to each primary class will be litigated first, and then only if such policies are not found to give rise to a constitutional violation will the additional common elements of each subclass be introduced and litigated.

Defendants present arguments against superiority that are wholly irrelevant to this case. They state a Trial by Formula would trample Defendants' right to due process and a fair trial. Dkt. 323 at 26. There will be no Trial by Formula—Plaintiffs themselves reject this idea. Dkt. 325 at 14. It has already been addressed that this is a Rule 23(c)(4) damages class on the issue of liability, and that if Plaintiffs are successful there will be individual damage calculations. Dkt. 262 at 16–17.

C. RULE 23(c)(4) REQUIREMENTS

This Court has previously held that "the efficiency of a single liability determination regarding the common procedures used by DRDF deputies is sufficient for Federal Rule of Civil Procedure 23(c)(4). Dkt. 262 at 17. The Court sees no reason, and Defendants provide none, to reconsider this determination.

V. CONCLUSION

In certifying the class, the Court cannot reach the merits of these constitutional claims. *See Edwards v. First American Corp.*, 798 F.3d 1172, 1178 (9th Cir. 2015). Some, or all, of these allegations may not survive summary judgment. At this point, the Court merely finds that they satisfy the requirements for class certification. For the foregoing reasons, the Court:

1. GRANTS Plaintiff's renewed motion for certification under Rule 23(c)(4) and certifies Class #1 and Class #2, with subclasses, as described above.
2. GRANTS Plaintiffs fourteen (14) days to amend the pleadings in order to cure the defect of having no named Plaintiff to represent Class #2.

IT IS SO ORDERED

Date: November 18, 2016

HON. STEPHEN V. WILSON
UNITED STATES DISTRICT JUDGE