UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF KANSAS

RUSSELL K. OGDEN, BEATRICE HAMMER and JOHN SMITH, on behalf of themselves and a class of persons similarly situated,	)	
Plaintiffs,	)	
v.	)	Case No. 16-cv-2288
	)	**CLASS ACTION**
PETE FIGGINS, in his official capacity as Sheriff for Wilson County, Kansas,	)	
Defendant.	)	

MEMORANDUM OF LAW IN SUPPORT OF
PLAINTIFFS' MOTION FOR CLASS CERTIFICATION

I. Proposed Plaintiff Class

The named Plaintiffs bring this action for declaratory and injunctive relief, on their own behalf and on behalf of a class of persons similarly situated, pursuant to Federal Rules of Civil Procedure 23(a) and (b)(2) (for injunctive relief). The class which the named Plaintiffs seek to represent consists of the following:

> all current and future outside correspondents who wish to write letters to, and/or receive letters from, inmates in the Wilson County Correctional Facility and who are subject to or affected by the Postcard-Only Mail Policy.

II. Legal Standard

Federal Rule of Civil Procedure 23 establishes the basic requirements for certification of a class action. *See* Rule 23(a), Fed. R. Civ. Pro.; *Shook v. El Paso County*, 386 F.3d 963, 968 (10th Cir. 2004). As an initial matter, it is important to remember that class certification is solely a procedural issue, and the court's inquiry is properly limited to determining whether the proposed class satisfies the requirements of Rule 23. *See Eisen v. Carlisle & Jacquelin*, 417 U.S. 156, 177-78 (1974). In ruling on a

motion for class certification, the court should "accept as true the allegations in the complaint" and resolve any doubt "in favor of certification." *Roderick v. XTO Energy, Inc.*, 281 F.R.D. 477, 480 (D. Kan. 2012) (citing *Esplin v. Hirschi*, 402 F.2d 94, 99 (10th Cir. 1968), cert. denied, 394 U.S. 928 (1969)); *see also Freebird, Inc. v. Merit Energy Co.*, 2011 U.S. Dist. LEXIS 624, *2 (D. Kan. Jan. 4, 2011) ("In exercising its discretion, the district court should … resolve all doubts in favor of class certification … [and] accept plaintiff's substantive allegations as true.").

Moreover, a court should not conduct an inquiry into the merits of a plaintiffs' claim as part of class certification proceedings. *See Amgen, Inc. v. Conn. Ret. Plans & Trust Funds*, 133 S. Ct. 1184, 1195 (2013) ("A district court has no authority to conduct a preliminary inquiry into the merits of a suit at class certification unless it is necessary to determine the propriety of certification.") (citations omitted); *see also Adamson v. Bowen*, 855 F.2d 668, 676 (10th Cir. 1988) ("In making the class certification determination … the district court should avoid focusing on the merits underlying the class claim.").

III. The Proposed Plaintiff Class Satisfies the Prerequisites of a Class Action

As demonstrated herein, the named Plaintiffs, on behalf of themselves and a class of persons similarly situated, satisfy the requirements for class certification.

A. The Plaintiff Class is so Numerous that Joinder is Impracticable

Rule 23(a)(1), Fed. R. Civ. P., requires that the class be "so numerous that joinder of all members is impracticable." In order to satisfy this requirement, plaintiffs need not allege the exact number and identity of the class members, but must only establish that "joinder of all class members is impracticable," through "some evidence or reasonable

estimate [of] the number of class members who may be involved." *Heartland Communications v. Sprint Corp.*, 161 F.R.D. 111, 115 (D. Kan. 1995) (citing *Rex v. Owens*, 585 F.2d 432, 436 (10th Cir. 1978)). Towards this end, courts have found joinder impracticable and the numerosity requirement satisfied in cases with even a minimal number of class members. *See Jackson v. Ash*, 2014 U.S. Dist. LEXIS 38805, *9 (D. Kan. March 25, 2014) ("courts have found that classes as small as twenty members can satisfy the numerosity requirement"); *Sprint Nextel Corp. v. Middle Man, Inc.*, 2013 U.S. Dist. LEXIS 103207, *13-14 (D. Kan. July 24, 2013) ("class actions have been deemed viable in instances where as few as 17 to 20 persons are identified as the class") (citations omitted).

Here, the numerosity requirement is clearly met. Upon information and belief, the Jail's current average daily population as of the time of filing is roughly 35-40 inmates. Although some Jail inmates and their outside correspondents may not desire to write letters, the Postcard-Only Mail Policy applies to all inmates as well as their families, friends, and other outside correspondents, and there can be little doubt that at least 40 persons desire to do so. Therefore, the numerosity requirements of Rule 23(a)(1) have been met. *See Ash*, 2014 U.S. Dist. LEXIS 38805 at *10-11 ("The number of persons affected by the Policy, at any given time, is, *at a minimum*, 327, the Jail's inmate capacity. This is true because the Policy *applies* to all inmates, not to mention their family, friends, and other chosen outside correspondents, regardless of whether these individuals *use* the Jail's mail system.") (emphasis in original).

Additionally, a court may consider a number of other facts pertaining to numerosity, including the ease with which class members may be identified and the

nature of the action. *See Zeidman v. J. Ray McDermott & Co., Inc.*, 651 F.2d 1030, 1038 (5th Cir. 1981); *Tommey v. Computer Scis. Corp.*, 2013 U.S. Dist. LEXIS 43242 (D. Kan. Mar. 27, 2013). Here, the number of inmates housed in the Jail at any one time is in constant flux, as is the number of outside correspondents who wish to communicate with them. While the Jail's average daily population at the time of filing consists of 35-40 inmates, hundreds of persons are arrested and booked annually as inmates and made subject to the Jail's policies and practices, and many of these inmates have several outside correspondents with whom they need to correspond.

This fluid nature of the Proposed Plaintiff Class, and the inclusion in the class of future outside correspondents whose identities obviously cannot now be ascertained, makes joinder of all class members not just impracticable, but literally impossible. *See Ash*, 2014 U.S. Dist. LEXIS 38805 at *11 ("Other courts in this Circuit have held that 'numerosity is met where … the class includes individuals who will become members in the future. As members *in futuro*, they are necessarily unidentifiable, and therefore joinder is clearly impracticable.' Based on the fluid and ever-changing nature of the putative classes, the Court finds the requirement of numerosity of Rule 23(a)(1) to be satisfied.") (citations omitted); *Phillips v. Joint Legis. Comm. on Performance & Expenditure Review of Miss.*, 637 F.2d 1014, 1022 (5th Cir. 1981) (noting that future class members are necessarily unidentifiable and therefore joinder is impracticable); *Andre H v. Ambach*, 104 F.R.D. 606, 611 (S.D.N.Y. 1985) ("The fact that the [detention center] population … is constantly revolving establishes sufficient numerosity to make joinder of the class members impracticable"); *Green v. Johnson*, 513 F. Supp. 965, 975

(D. Mass. 1981) (certifying class of prisoners "in light of the fact that the inmate population at these facilities is constantly revolving.").

B. There are Common Questions of Law and Fact

The second requirement is that "there are common questions of law or fact common to the class." Rule 23(a)(2), Fed. R. Civ. P.. Traditionally, commonality refers to the group characteristics of the class a whole. *See Prado-Steiman ex rel. Prado v. Bush*, 221 F.3d 1266, 1279 (11th Cir. 2000). As such, this prerequisite does not mandate that all questions of law or fact are common; a *single common question* of law or fact is sufficient to satisfy the commonality requirement, as long as it affects all class members alike. *See J.B. v. Valdez*, 186 F.3d 1280, 1299 (10th Cir. 1999) ("Because the [commonality] requirement may be satisfied by a single common issue, it is easily met.") (citations omitted); *Thompson v. Jiffy Lube Int'l, Inc.*, 250 F.R.D. 607, 620 (D. Kan. 2008) ("[a] single common issue of fact or law shared by the class will satisfy the requirement of Rule 23(a)(2)."). Ultimately, the "threshold for commonality is not high." *Jiffy Lube Int'l, Inc.*, 250 F.R.D. at 620; *see also Valdez,* 185 F.3d at 1299; *Vega v. T-Mobile USA, Inc.*, 564 F.3d 1256, 1268 (11th Cir. 2009).

The commonality element is satisfied here because the questions of law and fact refer to standardized conduct by defendant towards members of the Proposed Plaintiff Class. All members of the Proposed Plaintiff Class desire to write letters to, and/or receive letters from, inmates housed in the same facility, and all of them are equally subject to defendant's Postcard-Only Mail Policy. Accordingly, common material questions of fact and law include, but are not limited to, the following:

a. the scope and nature of defendant's Postcard-Only Mail Policy;

b. the scope, criteria, and process for invoking the alleged "privileged mail" exception to defendant's Postcard-Only Mail Policy;

c. the scope and nature of defendant's interests and/or justifications in instituting and maintaining the Postcard-Only Mail Policy;

d. whether the defendant's Postcard-Only Mail Policy provides either the sender or intended recipient of any rejected communication with any notice of, reasons for, or opportunities to challenge, the Jail's censorship of protected speech; and

e. whether the application of defendant's Postcard-Only Mail Policy violates the rights of the members of the Proposed Plaintiff Class under the First and Fourteenth Amendments to the U.S. Constitution.

All of the injuries detailed in plaintiffs' Class Action Complaint stem from a single policy of defendant – the Postcard-Only Mail Policy. Although individual members of the Proposed Plaintiff Class will inevitably be affected in different ways by the Postcard-Only Mail Policy, these factual differences do not defeat certification where the named plaintiffs have identified a "common nucleus of operative facts" such as the policy at issue here. *Oshana v. Coca-Cola Bottling Co.*, 225 F.R.D. 575, 581 (N.D. Ill. 2005). As succinctly stated by this Court in an analogous case challenging a nearly identical correctional policy:

> While it is clear that each inmate may be affected differently by the Policy based on his or her communication preferences, it is also clear that a finding of commonality 'does not require that class members share every factual and legal predicate. A single common issue of fact or law shred by the class will satisfy the requirement' … Given the liberal nature of the commonality requirement, the Court finds that Plaintiffs have demonstrated that this case revolves around a common question, namely, the constitutionality of the Postcard-Only Mail Policy. As such, the Court

> finds that Plaintiffs have satisfied the Rule 23(a)(2) commonality requirement.

Ash, 2014 U.S. Dist. LEXIS 38805 at *14, *citing Thompson*, 250 F.R.D. at 620.

Accordingly, the controlling, material questions of fact and law in this case are common to the entire class, and the commonality requirement of Rule 23(a)(2), Fed. R. Civ. P., is satisfied.

C. Plaintiffs' Claims are Typical of Those of the Class

The third requirement is that "the claims or defenses of the representative parties are typical of the claims or defenses of the class." Rule 23(a)(3), Fed. R. Civ. P.. "In many ways, the commonality and typicality requirements of Rule 23(a) overlap. Both requirements focus on whether a sufficient nexus exists between the legal claims of the named class representatives and those of individual class members to warrant class certification." *Bush*, 221 F.3d at 1278-79. Traditionally, commonality refers to the group characteristics as a whole, while typicality refers to the individual characteristics of the named plaintiff in relation to the class. *See Baby Neal v. Casey*, 43 F.3d 48, 56 (3d Cir. 1994). These requirements "serve as guideposts for determining whether under the particular circumstances maintenance of a class action is economical and whether the named plaintiff's claim and the class claims are so interrelated that the interests of the class members will be fairly and adequately protected in their absence." *General Telephone Co. of Southwest v. Falcon*, 457 U.S. 147, 157 (1982).

A representative's claim is typical if it arises from the same event, practice, or course of conduct that gives rise to the claims of other class members and if his or her claims are based on the same legal theory. *See Kornberg v. Carnival Cruise Lines, Inc.*, 741 F.2d 1332 (11th Cir. 1984); *Thompson*, 250 F.R.D. at 622 (citing *Oshana v. Coca-*

Cola Co., 472 F.3d 506, 514 (7th Cir. 2006)) ("the typicality requirement is meant to ensure that the named representative's claims have the same essential characteristics as the claims of the class at large."). Further, as with commonality, "differing fact situations do not defeat typicality … so long as the claims of the class representative and class members are based on the same legal or remedial theory." *Bowen*, 855 F.2d at 675; *see also Arkalon Grazing Ass'n v. Chesapeake Operating, Inc.*, 275 F.R.D. 325, 329 (D. Kan. 2011).

Here, the claims, legal theories, interest, and suffered injury of the named Plaintiffs and the Proposed Plaintiff Class are identical. The named Plaintiffs and all members of the Proposed Plaintiff Class are currently subject to – or will be subject to – defendant's Postcard-Only Mail Policy. The claims of the named Plaintiffs – that defendant's Postcard-Only Mail Policy violates the free expression and due process guarantees of the First and Fourteenth Amendments to the U.S. Constitution – are identical to the claims of all members of the Proposed Plaintiff Class, and defendant has uniformly applied this policy to all such persons. Therefore, the "typicality" requirement is fully satisfied. *See Ash*, 2014 U.S. Dist. LEXIS 38805 at *15-16 (finding the typicality requirement satisfied in a nearly identical challenge to the Wyandotte County Adult Detention Center's prior Postcard-Only Mail Policy).

D. The Named Plaintiffs will Fairly and Adequately Protect the Interests of the Proposed Plaintiff Class

The final requirement of Rule 23(a) is that "the representative parties will fairly and adequately protect the interests of the class." To meet this requirement, "[a] representative plaintiff must be a member of the class it seeks to represent and show that (1) neither plaintiff nor its counsel has interests that conflict with the interests of other

class members; and (2) plaintiff will prosecute the action vigorously through qualified counsel." *Arkalon Grazing Ass'n*, 275 F.R.D. at 330 (citing *Tex. Motor Freight Sys., Inc. v. Rodriguez*, 431 U.S. 395, 403 (1977)).

The named plaintiffs' attorneys are qualified, experienced and able to conduct this action. The named plaintiffs' attorneys are employed by the ACLU Foundation of Kansas and the Social Justice Law Collective, which have extensive experience in class action cases involving federal civil rights claims for prisoners. The named plaintiffs' attorneys have previously litigated constitutional and statutory issues for prisoners in federal courts, have litigated the constitutionality of correctional postcard-only mail policies in this District and others, and are familiar with the issues raised in this litigation. Additionally, the attorneys have litigated numerous class actions and have the personnel and the resources to fully litigate this action.

The named plaintiffs have standing to bring an action for violation of their constitutional rights and, since they do not seek monetary or any other individual relief, have no interests antagonistic to or in conflict with the interests of the class members they seek to represent. The named plaintiffs and the members of the Proposed Plaintiff Class share a common, singular goal: an end to defendant's Postcard-Only Mail Policy. The named Plaintiffs fully understand their fiduciary role when serving as a representative of others in a class action and are prepared to follow through with their obligations. In sum, the named plaintiffs will diligently and fairly protect and pursue the interests of the Proposed Plaintiff Class because they possess the same interests and have suffered the same injury as the other members. *See Ash*, 2014 U.S. Dist. LEXIS 38805 at *16-17.

E. The Proposed Plaintiff Class Satisfies the Requirements of Rule 23(b)(2)

Federal Rule of Civil Procedure 23(b)(2) is satisfied through the discussion of Rule 23(a)'s requirements and the factual allegations describing the constitutional violations that the members of the Proposed Plaintiff Class have been subjected to as a result of defendant's actions. All of the injuries detailed in plaintiffs' Class Action Complaint stem from a single policy of defendant – the Postcard-Only Mail Policy – and defendant has uniformly applied this policy to all inmates and their outside correspondents. Accordingly, class certification is appropriate because defendant has acted and/or refused to act in the same or similar manner with respect to all members of the Proposed Plaintiff Class, thereby making injunctive relief appropriate with respect to the Proposed Plaintiff Class as a whole. *See Ash*, 2014 U.S. Dist. LEXIS 38805 at *18-19 ("Here, it is clear, despite Defendant's objection to the contrary, that Plaintiffs seek only *one* remedy on behalf of themselves and all Proposed Class Members: an order enjoining Defendant … from continuing the Postcard-Only Mail Policy."). The requirements of Federal Rule of Civil Procedure 23(b)(2) are therefore satisfied.

WHEREFORE, Plaintiffs respectfully request that the court (1) find that the Proposed Plaintiff Class meets the requisites of Federal Rules of Civil Procedure 23(a) and (b)(2); (2) certify this action as a class action with the Proposed Class as defined above; (3) appoint Plaintiffs Ogden, Hammer and Smith as class representatives for the Proposed Class; (6) appoint undersigned counsel as Class Counsel pursuant to Federal Rule of Civil Procedure 23(g); and (7) grant all other and further relief that the Court deems equitable and just.

Respectfully submitted,

/s/ *Joshua A. Glickman* .
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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that the foregoing was electronically filed with the Clerk of the Court using the CM/ECF system on April 28, 2016, and will be hand-delivered to defendant along with the Complaint and summons.

/s/ *Stephen Douglas Bonney*