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S.C. SUPREME COURT

THE STATE OF SOUTH CAROLINA
In The Supreme Court

In the Original Jurisdiction

Appellate Case No. 2025-000689

Calvin Henson, Daniel James Collins, Jason Robinson,
Russell Taylor, and All Those Similarly Situated, Respondents,

v.

South Carolina Department of Corrections and the
South Carolina Department of Juvenile Justice, Petitioners.

SUPPLEMENTAL APPENDIX

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STATE OF SOUTH CAROLINA)
)
 COUNTY OF DORCHESTER)
)
)
 Calvin Henson, Daniel James Collins,)
 Jason Robinson, Russell Taylor and All)
 Those Similarly Situated,)
)
 Plaintiffs,)
)
 v.)
)
 South Carolina Department of)
 Corrections and the South Carolina)
 Department of Juvenile Justice,)
)
 Defendants.)
 _____)

IN THE COURT OF COMMON PLEAS

Civil Action No. 17-CP-18-1125

**DEFENDANT SCDJJ’S MEMORANDUM IN
OPPOSITION TO PLAINTIFFS’ NOTICE
OF MOTION AND MOTION FOR CLASS
CERTIFICATION**

Defendant South Carolina Department of Juvenile Justice (“SCDJJ”) respectfully submits the following Memorandum in Opposition to Plaintiffs’ Notice of Motion and Motion for Class Certification that was filed on August 31, 2023.

PLAINTIFFS’ ALLEGATIONS

Plaintiffs, individually and as members of a putative class, bring this suit alleging that the South Carolina Department of Corrections (“SCDC”) failed to implement and enforce policies and practices to protect Plaintiff’s Henson, Collins, and Robinson while in custody at Lieber Correctional Institution and Kirkland Correctional Institution. In a completely unrelated incident, Plaintiff alleges SCDJJ failed to protect Plaintiff Taylor while he was detained at Coastal Evaluation Center in Ridgeville, South Carolina.

Specifically, Plaintiffs allege Defendants have failed to implement policies and practices to reduce and prevent sexual assault and have failed to properly use funds to implement those policies and practices. They allege that these failures were the proximate cause of their sexual assaults. Plaintiffs seek a declaratory judgment and injunctive relief. Both Defendants timely answered the Plaintiffs' Amended Complaint and denied these allegations.

In the Complaint, Plaintiffs assert that the case requires administration as a class action. Both Defendants contend class action is inappropriate and an inferior procedural mechanism for resolving this litigation. Plaintiffs filed a motion for class certification and now seek to certify a class consisting of:

The Class consists of all prisoners and former prisoners in South Carolina who have been in the custody and care of SCDC and SCDJJ in South Carolina from 2012 who were victims of rape and/or sexual assault as a result of the Defendants' failure to implement and enforce their own policies and practices.

See, Amended Complaint at ¶ 70. Defendant SCDJJ will show that class certification is unnecessary and detrimental to the administration of this suit and any suit brought from the underlying facts of this case on the following grounds: Plaintiffs cannot satisfy the requirements of Rule 23 of the South Carolina Rules of Civil Procedure as each putative plaintiff will require an individualized accounting of their claims and class action does not promote efficiency for this litigation.

STANDARD OF REVIEW

Upon a motion for class certification, it is incumbent on the court to determine whether the action meets each of the five prerequisite components of class certification. *See Gardner v. South Carolina Dep't of Revenue*, 353 S.C. 1, 20-21, 577 S.E.2d 190, 200 (2003). As Plaintiffs seek

class certification, they bear the burden to prove each of the prerequisites under South Carolina Rule of Civil Procedure 23. *Id.* The class certification prerequisites under Rule 23 are:

- 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;
- 4) The representative parties must fairly and adequately protect the interests of the class; and
- 5) The amount in controversy must exceed one hundred dollars for each member of the class.

Rule 23(a), SCRPC. “[T]he failure to meet any one prerequisite of Rule 23(a) is fatal to the certification of a class.” *Waller v. Seabrook Island Prop. Owners Ass’n*, 300 S.C. 465, 469, 388 S.E.2d 799, 802 (1990). “In deciding whether class certification is proper, the court must apply a rigorous analysis to determine each prerequisite is satisfied.” *Gardner*, 353 S.C. at 21, 577 S.E.2d at 200.

ARGUMENT

Class certification in this case fails to advance the objectives articulated by prior South Carolina courts considering certification. Certification will hinder the execution and administration of judicial economy. Depositions and written discovery have shown that the evaluation of putative plaintiffs, the putative plaintiffs’ claims, Defendants’ potential defenses to those claims, damages, and remedies available to Plaintiffs are highly individualized and would require the Court and parties to engage in a series of mini-trials or evidentiary hearings with individualized fact-finding to adjudicate each existing Plaintiffs’ claim and each putative class

members' claims.¹ Therefore, class action status fails to provide a better procedural mechanism for resolving this litigation and this Court should deny Plaintiffs' motion for class certification.

I. Under SCRCP 23(a), Plaintiffs fail to satisfy the requirements for class certification.

a. Numerosity Fails as the Number of Plaintiffs is Better Served by Different Procedural Mechanisms.

Plaintiffs cannot establish numerosity because the class size is diminutive. Rule 23(a)(1) provides that an action may be maintained only if the "class is so numerous that joinder of all members is impracticable." SCRCP 23(a)(1). No bright line test exists for determining numerosity, however, and the determination rests on the court's practical judgment in light of the particular facts of the case. *Lott v. Westinghouse*, 200 F.R.D. 539, 550 (D.S.C. 2000) (quoting *Buford v. H & R Block, Inc.*, 168 F.R.D. 340, 348 (S.D. Ga. 1996) (finding numerosity based on over 4,000 putative plaintiffs but denying class for failure to meet the remaining class requirements).²

A finding of numerosity in this case requires speculation rather than support based on direct or circumstantial evidence. Over six years have passed since the filing of the Complaint and Plaintiffs have failed to identify any other putative plaintiffs other than Russell Taylor. While it may be tempting to assume there are many class members based on the number of juveniles allegedly sexually assaulted at SCDJJ since 2012³ – juveniles and putative litigants are not

¹ Although South Carolina did not specifically adopt the predominance element of Rule 23 of the Federal Rules of Civil Procedure, the South Carolina Supreme Court recently held "there must be a proper balance between common and individualized issues in order to achieve the efficiencies the class procedure was designed to promote." *Hensley v. S.C. Dep't of Soc. Servs.*, 429 S.C. 144, 152, 838 S.E.2d 510, 514 (2020).

² Federal case law provides insight into the determination of class actions without the need for considering predominance.

³ As the Court is aware, the statute of limitations for any claims against Defendant SCDJJ is two years. S.C. Code Ann § 15-78-110. It follows that any claims made by potential putative plaintiffs arising after July 23, 2015 are time barred.

synonymous. In this case, Plaintiffs' motion presents as a license for the proverbial "fishing expedition." Any method of "catching" new plaintiffs would require individualized fact finding to determine the threshold issue of whether they are part of the proposed ascertainable class. This analysis is the first of many individualized inquiries required in the proposed litigation process. Rather than aggrieved parties seeking representation for their injuries, this case presents the inverse – attorneys seeking injured parties.

b. Commonality Fails because the Putative Class Negates the Benefits of Class Action Status.

"To establish commonality a party must show that 'there are questions of law or fact common to the class.'" *Gardner*, 353 S.C. at 20, 577 S.E.2d at 200 (quoting Rule 23, SCRCP). "In practical terms this means the party must articulate the existence of 'significant common, legal, or factual issues' which bind the proposed class together" *Id.* (quoting *Boggs v. Divested Atomic Corp.*, 141 F.R.D. 58, 64 (S.D. Ohio 1991)). "Commonality is met only where the class shares a determinative issue." *Id.* at 21, 577 S.E.2d at 200-01.

As the South Carolina Supreme Court recently held "[t]he commonality requirement [of Rule 23(a), SCRCP] is a condition of class action status, but the existence of common questions alone is not sufficient....[T]he class action must be a better procedural mechanism for resolving the litigation than named joinder or separate litigation." *Hensley*, 429 S.C. at 152, 838 S.E.2d at 514 (quoting Harry M. Lightsey & James F. Flanagan, *South Carolina Civil Procedure* 199 (1st ed. 1985)); *see also Gardner*, 353 S.C. at 22, 577 S.E.2d at 201 (reversing the circuit court's certification of a class because "the factual differences...are the crux of a predominant legal issue," and stating, "A representative class cannot exist where the court must investigate each plaintiff's ...claim. Requiring such individualized examination negates the benefits of a class action suit.")

In this case, even as it stands today, there are multiple issues that will assuredly require individualized trials or evidentiary hearings. Indeed, Plaintiffs cannot show, as required in *Gardner*, that there is a common determinative issue. As Plaintiffs' claims are against governmental entities, the South Carolina Tort Claims Act will serve as the exclusive and sole source of any remedy.

Plaintiffs allege SCDC and SCDJJ were grossly negligent for their failure to adopt, implement, and enforce certain rules, regulations, or written policies as promulgated in accordance with PREA.⁴ Given these allegations, this Court will be required to undergo a case-by-case analysis of each Plaintiff's claims and each putative class members' claims in light of the evidence unique to their claims in order to determine whether each Plaintiff has met the higher burden of proving SCDC acted or failed to act in a grossly negligent manner. S.C. Code Ann. § 15-78-60 (25). Likewise, should the case proceed to trial, a jury would be presented with claims that would require analysis on a case-by-case basis in order to determine whether Defendants' actions/inactions meet the grossly negligent standard. As a consequence, as was the case in *Gardner*, the requirement of commonality is not present.

⁴ Courts have consistently held that PREA does not create or provide a private right or cause of action against prison officials. *See Alexander v. Sandoval*, 532 U.S. 275, 286 (2001) (asserting that Congress must create a private right of action either explicitly or implicitly and the court cannot create a private right of action without that intent); *see also Bennett v. Parker*, No. 3:17-cv-1176, 2017 U.S. Dist. LEXIS 169876, at *5–6 (M.D. Tenn. Oct. 13, 2017) (dismissing plaintiff's PREA claims because other district courts have asserted that the statute does not create a private cause of action); *Longoria v. Cty. of Dallas*, No. 3:14-CV-3111-L, 2017 WL 958605, at *16 (N.D. Tex. Mar. 13, 2017) (dismissing plaintiff's rape claims alleging that an officer raped her because the "claim based on . . . PREA is fundamentally flawed, as it is based on the faulty assumption that the standards established by PREA are mandatory requirements"); *Miller v. Griffith*, No. 4:16CV539 JAR, 2016 U.S. Dist. LEXIS 56507, at *4–5 (E.D. Miss. Apr. 28, 2016) (dismissing plaintiff's PREA sexual assault claims as legally frivolous).

In the interest of judicial economy, class certification should not depend on the raising of common questions, but on whether conducting class-wide litigation will provide common answers to determinative issues (i.e., dispositive issues) such that the class action mechanism provides a manageable and efficient means to adjudicate multiple claims of multiple parties. Plaintiffs' Amended Complaint raises several allegedly common questions, or factual occurrences, but the resolution of those questions are not determinative and would still require individualized inquiry tailored to each Plaintiff and each putative class member. For example, such individualized inquiry would apply to whether the putative class members' claims were substantiated or unsubstantiated after investigation, whether putative class members even reported their alleged assault, whether SCDC/SCDJJ policy or procedure violations led to the assault, whether SCDC/SCDJJ staffing was inadequate, and, indeed, whether the assault even occurred at all. In sum, the class as defined by the Plaintiffs should not be certified given that the claims and defenses would "necessitate[] forming legal arguments around the individual facts of each case." *Gardner*, 353 S.C. at 23, 577 S.E.2d at 201.

c. Typicality Fails as the Claims and Defenses Differ Across the Putative Class.

Typicality requires that the claims or defenses of the representative parties must be typical of the claims or defenses of the class. Rule 23(a)(3), SCRCP. The necessity for individualized inquiry prevents commonality and typicality from being satisfied. *Lott*, 200 F.R.D at 539. Like the Commonality requirement, significant differences in the underlying facts on which the legal theories rest preclude a finding of Typicality. If a class is certified it would fundamentally require threshold inquiries to individualized facts and evidentiary hearings over particularized relief based on the differences in the individual potential class members' circumstances, the particular remedies

granted, the alleged damages, particularized defenses, and the resulting need, if any, to fashion individual relief to address these variations.

For example, unique and individualized defenses will likely become a major focus of the litigation given the claims asserting gross negligence as well as prospective injunctive relief. The alleged grossly negligent actions and associated claims requiring proof of willful and wanton conduct, will likewise require individualized facts and may be undermined by defenses pursuant to the South Carolina Tort Claims Act as well as the applicable statute of limitations. Therefore, typicality must fail due to the individualized nature of claims and defenses, including the requirement to engage in individualized inquiry.

d. Adequacy Fails for Lack of Fairness and Individualized Protection.

The Adequacy requirement states that “[t]he representative parties must fairly and adequately protect the interests of the class.” Rule 23(a)(4), SCRPC. The adequacy requirement seeks to “uncover conflicts of interest between named parties and the class they seek to represent.” It calls for a determination of whether the interests and incentives between the representative plaintiffs and the rest of the class are aligned or antagonistic. Intra-class conflicts may arise when class members seek conflicting remedies, or some class members actually benefit from the challenged conduct.

Plaintiffs rely exclusively on the estimation of current and/or former juvenile detainees being “so numerous” as the putative class. However, Plaintiffs have offered nothing demonstrating that any of these putative class members suffered the type of damages alleged by the presently named Plaintiffs. The named Plaintiffs remain the only identifiable class members injured as alleged in the Complaint and now Amended Complaint. Plaintiffs have not shown the numerosity of putative class members vying for the same redress. Plaintiffs’ Amended Complaint and motion

are based on the highly individualized account of four current and/or former inmates. By Plaintiffs' pleadings and motions, however, their claims must be examined one-by-one, on their own, as they have shown nothing indicating that their claims are similar to other members of the putative class. The existence of one type of case for personal injury does not establish the viability of claims of other putative plaintiffs with entirely different circumstances. Therefore, a class action is not in the interests of the putative class members.

Judicial economy favors addressing the individual claims by the individuals who are in the best position to plead their specific harms. By certifying a class, this Court would create additional hardship and burden to plaintiffs bringing their own claims. Plaintiffs are best served by articulating their individualized damages and concerns through their own counsel. The remedies sought are disparate, individualized, and are available to individuals without the need of a class. Not "every prisoner and former prisoner who have been in the custody and care of SCDJJ in South Carolina from 2012 who were victims of rape and/or sexual assault as a result of SCDJJ's failure to implement and enforce their own policies" will have the same claims, damages, nor will the same defenses be applicable. Individualized plaintiffs are in the best position, as the master of their own complaints and cases, to represent their own interests. The putative class members do not gain additional benefits from the class and a class would only add costs of providing notice, administration of the class, and paying attorneys' fees to class counsel. Individual plaintiffs are better able to shape the terms of litigation or settlement of their individual claims. Certifying the class will effectively remove the ability for individual litigants to pursue his or her best interests.

Class certification would not achieve the goals of fairness and efficiency, not for the Court, not for the Defendants, and especially not for the putative plaintiffs. Former juvenile detainees who have been victims of rape or sexually assaulted are in the best position to seek remedy for

themselves rather than in the structure of a class. The Plaintiffs in this case do not need class certification for redress or compensation, they are represented by counsel and will receive no greater recovery through the class process. Instead, this Court should allow any claims that the putative class members have against the Defendants to be individually litigated. Class actions are designed to eliminate repetitious litigation and the possibility of inconsistent adjudication. However, in this case, class certification would create a license to create a mass tort of manufactured and compiled claims.

Given the number of parties and claims and the absolute likelihood that the Court will be required to engage in individualized inquiry on multiple levels, separate litigation is the preferable vehicle to adjudicate such individualized claims. In fact, this point further demonstrates why the Defendants' motions to sever or bifurcate are also meritorious. As mentioned earlier, the Plaintiffs' proposed class action does not even meet the requirements of Rule 20(a), SCRCP, in that *each* Plaintiff does not have a cause of action against *each* Defendant as required by the rules of joinder. The same would be true for each putative class member.

Under Rule 20(a), a party may join or be joined if he asserts or there is asserted against him "any right to relief jointly, severally, or in the alternative in respect of or arising out of the same transaction, occurrence, or series of transactions or occurrences and if any question of law or fact common to all these persons will arise in the action." Rule 20(a). As to joining parties as defendants, Rule 20(a) states: "All persons may be joined in one action as defendants if there is asserted against them jointly, severally, or in the alternative, any right to relief in respect of or arising out of the same transaction, occurrence, or series of transactions or occurrences and if any question of law or fact common to all defendants will arise in the action." Rule 20(a). This case does not satisfy Rule 20(a). In many respects, this case is similar to *Valentine v. Davis*, 319 S.C.

169, 460 S.E.2d 218 (Ct. App. 1995), where the Court of Appeals found misjoinder under Rule 20(a) because the allegations asserted by the separate groups of plaintiffs “do not arise out of the same transaction or series of transactions or occurrences,” and “[i]n fact, the only connection between the claims is that the Valentines, Slother, and the Williams are represented by the same attorney and they all assert different personal claims against the Davis group.” 319 S.C. at 172, 460 S.E.2d at 220. Similarly, in *Ellis v. Oliver*, 307 S.C. 365, 415 S.E.2d 400 (1992), the Supreme Court recognized that the existence of a “common question of law or fact” is not sufficient because “joinder requires the additional requirement that the claims must arise out of the same transaction or occurrence.” 307 at 367, 415 S.E.2d at 401.

In sum, the Plaintiffs have not shown that the same Plaintiffs and the putative class members have claims “arising out of the same transaction, occurrence, or series of transactions or occurrences” against *both* SCDC and SCDJJ. Most importantly, not one of the Plaintiffs was confined at *both Departments* and was sexually assaulted while confined at *both Departments*, and likewise, the Plaintiffs’ class definition does not require that a putative class member be confined at *both Departments* and be sexually assaulted while confined at *both Departments*. Thus, the claims are not properly joined, and for this additional reason, the motion for class certification fails.

CONCLUSION

Class certification in this case fails to advance the objectives articulated by prior South Carolina courts considering certification. Class certification will hinder the execution of this litigation and the administration of judicial economy. The claims, facts, defenses, and damages of each putative plaintiff are highly individualized and would require the Court and parties to engage in a series of mini-trials and fact finding to adjudicate each claim. If the class action mechanism is

approved for this case, the net result will be an immense and unwieldy case that is incapable of being taken to final judgment in an efficient and manageable manner. For all of these reasons, this Court is respectfully requested to deny Plaintiffs' motion for class certification.

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January 29, 2024

STATE OF SOUTH CAROLINA) IN THE COURT OF COMMON PLEAS
)
 COUNTY OF DORCHESTER) FIRST JUDICIAL CIRCUIT

CALVIN HENSON, DANIEL JAMES) C/A No. 2017-CP-18-01125
 COLLINS, JASON ROBINSON, RUSSELL)
 TAYLOR, and ALL THOSE SIMILARLY)
 SITUATED,)

Plaintiffs,)

Versus)

SOUTH CAROLINA DEPARTMENT OF)
 CORRECTIONS and the SOUTH CAROLINA)
 DEPARTMENT OF JUVENILE JUSTICE,)

Defendants.)

**DEFENDANT SOUTH CAROLINA
 DEPARTMENT OF CORRECTIONS’
 MEMORANDUM IN OPPOSITION TO
 PLAINTIFFS’ MOTION TO CERTIFY
 CLASS**

Defendant South Carolina Department of Corrections (hereinafter “SCDC” or “this Defendant”) respectfully submits the following Memorandum of Law in Opposition to Plaintiffs’ Motion to Certify Class, filed on August 31, 2023. Furthermore, both SCDC and SCDJJ have renewed their motions to sever and bifurcate, arguing that these claims, as pled, are misjoined and should be severed and tried separately.

CASE OVERVIEW

Plaintiffs, individually and as members of a putative class, bring this suit alleging that they each experienced an independent basis of a form of sexual assault while incarcerated. Plaintiffs Henson, Collins, and Robinson were adults incarcerated within SCDC at the time of their alleged assaults, while Plaintiff Taylor (previously identified as ‘John Doe’ as he was a minor at the time) alleges he was assaulted while incarcerated with SCDJJ. [see Amended Complaint, filed Feb. 15, 2023]. As pled, each Plaintiff’s alleged occurrence(s) happened at different prisons, at different times, on different dates, at the hands of different assailants. [Id.]. Plaintiffs allege that SCDC and

SCDJJ failed to implement and/or follow policies and procedures promulgated by the Federal Prison Rape Elimination Act (PREA), which they allege, would have prevented them from being sexually assaulted by other inmates. [Id]. Plaintiffs causes of action include negligence/gross negligence, declaratory action, and injunctive relief. In addition to declarative and injunctive relief, Plaintiffs seek “general and special compensatory damages,” costs and “reasonable attorneys’ fees.” [Id.].

PROCEDURAL POSTURE

On July 23, 2017, Plaintiffs Collins, Robinson, and John Doe Minor (the “original Plaintiffs”) filed this action in Dorchester County Circuit Court each alleging negligence / gross negligence against SCDC and SC DJJ arising out of and related to claims that they had been sexually assaulted by inmate cellmates at their assigned prisons over the course of calendar years 2015 and 2016.¹ [See Complaint filed 07/23/17]. The original Complaint was later amended on February 15, 2023, despite opposition from Defendants, to add a fourth Plaintiff (Henson), also claiming he was the victim of sexual assault by his cellmate at his SCDC Institution (Kirkland C.I.) in October of 2020; also at that time, Plaintiff Taylor was substituted for the formerly named Doe Minor, as he had reached the age of majority. [See Amended Complaint filed 02/15/23]. Other than adding a fourth named Plaintiff, with his own corresponding allegations, and formally identifying the John Doe Minor, the substantive facts/allegations remained the same. Through this action, Plaintiffs seek declaratory judgment, injunctive relief, as well as compensatory damages. [Id.].

¹ Plaintiff Collins’ claims concern incident(s) while he was at Lieber C.I. Plaintiff Robinson’s claims concern incident(s) while he was at Ridgeland C.I. Plaintiff Doe’s (n.k.a Russell Taylor) claims concern an incident while he was at DJJ’s Coastal regional evaluation center. [Complaint, 07/23/17].

Following the original Complaint, SCDC filed a motion to sever and/or bifurcate, arguing the multiple Plaintiffs' claims were improperly joined and should be severed. [SCDC Motion to Sever, filed 12/13/17]. Prior to this, SC DJJ had filed a similar motion to sever / bifurcate. [SCDJJ Motion to Sever, filed 08/14/17]. By Order of the Court, the case was assigned to the Hon. Edgar Dickson "to handle all matters in this case." [Order, dated 11/03/17]. After briefing from the Parties, a hearing on Defendants' motions to sever/bifurcate was held before Judge Dickson on April 5, 2018. There was no ruling from the Bench, rather Defendants' motions were denied without prejudice approximately ten (10) months later. [Order dated 01/28/19]. In denying the motions, and without analyzing the merits of Plaintiffs' individual claims, the Court held that Defendants' motions were premature, and ordered that "[d]iscovery will proceed and Defendants may renew the motion as warranted by further proceedings in this case." [*Id.*]. Furthermore, Judge Dickson's Order concluded that Defendants' motions to sever/bifurcate would be more "appropriately considered by the Court when it decides whether this case should proceed as a certified class under SCRCP 23." [*Id.*].

Since Judge Dickson's Order, the Parties have engaged in extensive discovery and Plaintiffs have now filed their motion to certify class, which SCDC strenuously opposes. By their motion, Plaintiffs assert that the case requires administration as a class action. SCDC contends class action is inappropriate, impractical, and a vastly inferior procedural mechanism for resolving this litigation than if the cases were severed and tried separately. Plaintiffs motion for class certification seeks to certify a class consisting of:

The Class consists of all prisoners and former prisoners in South Carolina who have been in the custody and care of SCDC and SCDJJ in South Carolina from 2012² who were victims of rape

² Plaintiffs have brought suit against Defendants under the terms and limitations set forth in the South Carolina Tort Claims Act (SCTCA). The statute of limitations for any claims against

and/or sexual assault as a result of the Defendants' failure to implement and enforce their own policies and practices.

[Amended Complaint at ¶ 70].

Defendant SCDC will show that class certification is unnecessary and detrimental to the administration of this suit and any suit brought from the underlying facts of this case on the following grounds: Plaintiffs cannot satisfy the requirements of Rule 23 of the South Carolina Rules of Civil Procedure as each putative plaintiff will require an individualized accounting of their claims and class action does not promote efficiency for this litigation. Furthermore, Plaintiffs' motion seeks to impermissibly expand the scope of the putative class outside of the statute of limitations mandated by the South Carolina Tort Claims Act. Plaintiffs themselves are not representative of the putative class as their claims for injunctive relief are moot given they are no longer incarcerated. Finally, Plaintiffs claims do not meet the basic pleading requirements of the South Carolina Rules of Civil Procedure inasmuch as *each* Plaintiff does not have a cause of action against *each* Defendant. SCRCP 20.

STATEMENT OF FACTS

The allegations of negligence as against SCDC concern multiple, separate, and unrelated incidents that occurred to Plaintiffs Daniel James Collins, Jason Robinson, and Calvin Henson during their incarcerations at separate SCDC facilities: Lieber Correctional Institute (hereinafter "Lieber"), Ridgeland Correctional Institute (hereinafter "Ridgeland"), and Kirkland Correctional Institution (hereinafter "Kirkland"), respectively. [*See*, Amended Complaint].

Defendant SCDC is two (2) years. S.C. Code Ann § 15-78-110. Based on the date this action was initially filed, any claims made by potential putative plaintiffs arising *after* July 23, 2015 are time barred, as the SCTCA is the exclusive and sole remedy available and the terms of the TCA "must be liberally construed in favor of limiting the liability of the government entity." S.C. Code Ann. § 15-78-200.

Plaintiff Collins has alleged that this Defendant negligently approved predatory inmate Terry Whisenhunt's request to be housed in the same cell as him and as a result this Plaintiff was sexually assaulted by Whisenhunt on two occasions in June of 2016 at Lieber. Plaintiff Collins has not alleged any additional sexual encounters resulting from the negligence of SCDC or its agents. Plaintiff Collins never requested protective custody prior to or following the alleged events of June 2016, with the sole theory of negligence asserted against this Defendant being that SCDC should have prevented this housing arrangement based on Whisenhunt's prior predatory behavior towards other inmates.

Plaintiff Robinson has alleged that he was assaulted by fellow inmates from within the general Ridgeland Correctional Institute population in September of 2015. Robinson asserts that he was denied his request for protective custody following this event and that as a result he was sexually assaulted twice by his assigned roommate in February of 2016. After multiple alleged attempts at seeking protective custody through channels such as the SCDC Crisis Hotline and a subsequent South Carolina Law Enforcement Division investigation, Plaintiff Robinson asserts that his request for protective custody was once again denied. Upon return to the general prison population at Ridgeland, Plaintiff Robinson alleges that he was again sexually assaulted by and taken to the prison medical facilities where he was placed on suicide watch. After returning to the general prison population, Plaintiff Robinson asserts that he was sexually assaulted yet again and stabbed over 30 times by his roommate. It is not made clear from the face of the Complaint as to whether Plaintiff Robinson was being sexually assaulted by his assigned roommate during these alleged encounters or by others within the general prison population. Plaintiff Robinson's claims were investigated and found not to be credible. Since the original Complaint was filed, Plaintiff

Robinson was released from SCDC custody and returned not long afterwards on new charges related to criminal sexual conduct.

Plaintiff Henson has alleged that he was physically and sexually assaulted by “one of his two cellmates” at Kirkland on October 9, 2020 and again on some vaguely referenced occasion thereafter. Henson alleges that his efforts to report these attacks to SCDC employees “but nothing happened and no one responded.” Even after Plaintiff Henson was removed from general population, he claims he continued to be threatened by inmates. Plaintiff Henson’s claims were investigated by SCDC. All other parties interviewed denied any sexual abuse ever occurred. Medical results were inconclusive. Thus, it remains questionable as to whether Plaintiff Henson was ever actually assaulted as he claimed.

Included as an additional Plaintiff within the same Amended Complaint is Russell Taylor (formerly identified as juvenile “John Doe”). All of Plaintiff Taylor’s claims and allegations of negligence are against a wholly separate governmental entity, Defendant South Carolina Department of Juvenile Justice (SCDJJ). Upon information and belief, Plaintiff Taylor was never incarcerated at a SCDC facility. Furthermore, neither Plaintiffs Collins, Robinson, nor Henson allege they were assaulted at any SCDJJ facility.

Lastly included as a placeholder Plaintiff within the Complaint is ‘All Those Similarly Situated’. This Defendant’s arguments regarding misjoinder are not meant to be limited to the purported, individual claims of each named Plaintiff, and instead apply equally to Plaintiff’s purported attempts to establish a class action, because it is without question in our judicial system that each named plaintiff must have a cause of action against each named defendant. Furthermore, and considering the discovery undertaken thus far in the litigation, there has been no evidence that

any of the Plaintiffs' alleged sexual assaults were "as a result of the Defendants' failure to implement and enforce their own policies and practices."³

STANDARD OF REVIEW

Upon a motion for class certification, it is incumbent on the court to determine whether the action meets each of the five prerequisite components of class certification. *See Gardner v. South Carolina Dep't of Revenue*, 353 S.C. 1, 20-21, 577 S.E.2d 190, 200 (2003). As Plaintiffs seek class certification, they bear the burden to prove each of the prerequisites under South Carolina Rule of Civil Procedure 23. *Id.* The class certification prerequisites under Rule 23 are:

- 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;
- 4) The representative parties must fairly and adequately protect the interests of the class; and
- 5) The amount in controversy must exceed one hundred dollars for each member of the class.

Rule 23(a), SCRCP. "[T]he failure to meet any one prerequisite of Rule 23(a) is fatal to the certification of a class." *Waller v. Seabrook Island Prop. Owners Ass'n*, 300 S.C. 465, 469, 388 S.E.2d 799, 802 (1990). "In deciding whether class certification is proper, the court must apply a rigorous analysis to determine each prerequisite is satisfied." *Gardner*, 353 S.C. at 21, 577 S.E.2d at 200.

ARGUMENT

³ **See** S.C. Code Ann. §15-78-60. Exceptions to waiver of immunity, providing: "The governmental entity is in not liable for a loss resulting from: . . . (4) adoption, enforcement, or compliance with any law or failure to adopt or enforce any law, whether valid or invalid, including, but not limited to, any charter, provision, ordinance, resolution, rule, regulation, or written policies;"

Class certification in this case fails to advance the objectives articulated by prior South Carolina courts considering certification. On the contrary, certification will hinder the execution and administration of judicial economy. Initial discovery and the exploration of the parties' Joint Stipulation of Facts has clearly shown that the evaluation of putative plaintiffs, the putative plaintiffs' claims, Defendant's potential defenses to those claims, damages, and remedies available to Plaintiffs are highly individualized and would require the Court and parties to engage in a series of mini-trials and fact finding to adjudicate each claim.⁴ Therefore, class action status fails to provide a better procedural mechanism for resolving this litigation and this Court should deny Plaintiffs' motion for class certification.

I. Under SCRCP 23(a), Plaintiffs fail to satisfy the requirements for class certification.

a. Numerosity Fails as the Number of Plaintiffs is Better Served by Different Procedural Mechanisms.

Plaintiffs cannot establish numerosity because the class size is diminutive. Rule 23(a)(1) provides that an action may be maintained only if the "class is so numerous that joinder of all members is impracticable." SCRCP 23(a)(1). No bright line test exists for determining numerosity, however, and the determination rests on the court's practical judgment in light of the particular facts of the case. *Lott v. Westinghouse*, 200 F.R.D. 539, 550 (D.S.C. 2000) (quoting *Buford v. H & R Block, Inc.*, 168 F.R.D. 340, 348 (S.D. Ga. 1996) (finding numerosity based on over 4,000 putative plaintiffs, but denying class for failure to meet the remaining class requirements).⁵ A

⁴ Although South Carolina did not specifically adopt the predominance element of Rule 23 of the Federal Rules of Civil Procedure, the South Carolina Supreme Court recently held "there must be a proper balance between common and individualized issues in order to achieve the efficiencies the class procedure was designed to promote." *Hensley v. S.C. Dep't of Soc. Servs.*, 429 S.C. 144, 152, 838 S.E.2d 510, 514 (2020).

⁵ Federal case law provides insight into the determination of class actions without the need for considering predominance.

finding of numerosity in this case requires speculation rather than support based on direct or circumstantial evidence. Over six years have passed since the filing of the Complaint and Plaintiffs have failed to identify any other putative plaintiffs other than Henson, and even his claims are dubious. While it may be tempting to assume there are many class members based on the number of adults detained within SCDC prisons since 2012 – incarcerated adults and putative litigants are not synonymous. In this case, the Plaintiffs’ motion presents as a license for the proverbial “fishing expedition.” Any method of “catching” new plaintiffs would require individualized fact finding to determine the threshold issue of whether they are part of the proposed ascertainable class. This analysis is the first of many individualized inquiries required in the proposed litigation process. Rather than aggrieved parties seeking representation for their injuries, this case presents the inverse – attorneys seeking injured parties. Furthermore, upon information and belief, even while the instant case was ongoing, counsel for these Plaintiffs have brought similar claims on behalf of other inmates in other judicial circuits against SCDC in which they allege their clients were sexually assaulted; these claims are still pending

Additionally, as they are all current and/or former incarcerated individuals, the putative Plaintiffs are specifically and distinctively identifiable by name, number, and institution. geographic region. This is not a situation of a large and unidentifiable group that requires the notice and procedural mechanisms of a class for redress. As counsel for Plaintiffs are undoubtedly aware, both SCDC and SCDJJ, by their very nature as statewide prison systems, track and compile data on their inmate populations. This is not a broad, nation-wide litigation with an unknown class number. The inmate population during the range of years Plaintiffs propose is not infinite, and indeed may include current/former inmates who have already brought claims, resolved their claims, retained their own counsel, or do not satisfy the proposed class certification. Of the

remaining individuals, not every inmate will have a cognizable claim. Every incarcerated individual did not experience sexual assault, nor were the ones who did the result of either SCDC or SC DJJ's failure to implement or enforce their own policies and procedures. Simply put, each Plaintiff's claims will require independent investigation and analysis, as the circumstances of each are unique. This is not a case of a putative class requiring representation to assemble for redress.

b. Commonality Fails because the Putative Class Negates the Benefits of Class Action Status.

“To establish commonality a party must show that ‘there are questions of law or fact common to the class.’ *Gardner*, 353 S.C. at 20, 577 S.E.2d at 200 (quoting Rule 23, SCRCPP). “In practical terms this means the party must articulate the existence of ‘significant common, legal, or factual issues’ which bind the proposed class together” *Id.* (quoting *Boggs v. Divested Atomic Corp.*, 141 F.R.D. 58, 64 (S.D. Ohio 1991)). “Commonality is met only where the class shares a determinative issue.” *Id.* at 21, 577 S.E.2d at 200-01.

As the South Carolina Supreme Court recently held “[t]he commonality requirement [of Rule 23(a), SCRCPP] is a condition of class action status, but the existence of common questions alone is not sufficient....[T]he class action must be a better procedural mechanism for resolving the litigation than named joinder or separate litigation.” *Hensley*, 429 S.C. at 152, 838 S.E.2d at 514 (quoting Harry M. Lightsey & James F. Flanagan, *South Carolina Civil Procedure* 199 (1st ed. 1985)); *see also Gardner*, 353 S.C. at 22, 577 S.E.2d at 201 (reversing the circuit court's certification of a class because “the factual differences...are the crux of a predominant legal issue,” and stating, “A representative class cannot exist where the court must investigate each plaintiff's ...claim. Requiring such individualized examination negates the benefits of a class action suit.”)

In this case, even as it stands today, there are multiple issues that will assuredly require individualized trials or hearings. As Plaintiffs' claims are against governmental entities of the State

of South Carolina, the South Carolina Tort Claims Act will serve as the exclusive and sole source of remedy. Plaintiffs allege SCDC was grossly negligent for its failure to adopt, implement and enforce certain rules, regulations, or written policies as promulgated by PREA.⁶ Given these allegations, even as it stands currently, this Court will be required to undergo a case-by-case analysis of each Plaintiff's claims in light of the evidence in order to determine whether each Plaintiff has met the higher burden of proving SCDC acted or failed to act in a grossly negligent manner. S.C. Code Ann. § 15-78-60 (25). Likewise, should the case proceed to trial, a jury would be presented with claims that would require analysis on a case-by-case basis in order to determine whether Defendants' actions/inactions meet the grossly negligent standard. As a consequence, commonality fails.

In the interest of judicial economy, class certification should not depend on the raising of common questions, but on whether conducting class-wide litigation will provide common answers as the better procedural mechanism for litigation. Plaintiffs' Amended Complaint raises several allegedly common questions, or factual occurrences, but the answers to those questions require individualized inquiry tailored to the individual putative plaintiffs. For example, whether the putative plaintiffs' claims were substantiated or unsubstantiated after investigation, whether

⁶ Courts have consistently held that PREA does not create or provide a private right or cause of action against prison officials. *See Alexander v. Sandoval*, 532 U.S. 275, 286 (2001) (asserting that Congress must create a private right of action either explicitly or implicitly and the court cannot create a private right of action without that intent); *see also Bennett v. Parker*, No. 3:17-cv-1176, 2017 U.S. Dist. LEXIS 169876, at *5–6 (M.D. Tenn. Oct. 13, 2017) (dismissing plaintiff's PREA claims because other district courts have asserted that the statute does not create a private cause of action); *Longoria v. Cty. of Dallas*, No. 3:14-CV-3111-L, 2017 WL 958605, at *16 (N.D. Tex. Mar. 13, 2017) (dismissing plaintiff's rape claims alleging that an officer raped her because the "claim based on . . . PREA is fundamentally flawed, as it is based on the faulty assumption that the standards established by PREA are mandatory requirements"); *Miller v. Griffith*, No. 4:16CV539 JAR, 2016 U.S. Dist. LEXIS 56507, at *4–5 (E.D. Miss. Apr. 28, 2016) (dismissing plaintiff's PREA sexual assault claims as legally frivolous).

putative plaintiffs even reported their alleged assault, whether SCDC/SC DJJ policies/procedure violations led to the assault, whether SCDC/SC DJJ staffing was inadequate, and, indeed, whether the assault even occurred at all; at least one of the putative class representatives' claims of sexual assault were determined to be categorically false. Further, every incarcerated individual did not experience sexual assault, nor were the ones who did the result of either SCDC or SC DJJ's failure to implement or enforce their own policies and procedures. Simply put, each Plaintiff's claims will require independent investigation and analysis, as the circumstances of each are unique. In sum, this class should not be certified given that the claims or defenses would "necessitate[] forming legal arguments around the individual facts of each case." *Gardner*, 353 S.C. at 23, 577 S.E.2d at 201.

c. Typicality Fails as the Claims and Defenses Differ Across the Putative Class.

Typicality requires that the claims or defenses of the representative parties must be typical of the claims or defenses of the class. Rule 23(a)(3), SCRCF. The necessity for individualized inquiry prevents commonality and typicality from being satisfied. *Lott*, 200 F.R.D at 539. Like the Commonality requirement, significant differences in the underlying facts on which the legal theories rest preclude a finding of Typicality. If a class is certified it would fundamentally require threshold inquiry to highly individualized facts and evidentiary hearings over particularized relief based on the differences in the individual potential class members' circumstances, the particular remedies granted, the alleged damages, particularized defenses, and the resulting need, if any, to fashion individual relief to address these variations.

For example, unique and individualized defenses will likely become a major focus of the litigation given the claims asserting various forms of gross negligence as well as prospective injunctive relief. Simply looking at the four different stories as relayed through their Complaint,

each Plaintiff's circumstances are unquestionably unique, as are the defenses to those claims. Furthermore, despite these glaring differences, *each* Plaintiff has alleged that SCDC "failed to follow generally accepted proper protocol and failed to perform a proper investigation of the incidents in question." [Amended Complaint at 5, 7, and 9]. Defendant SCDC denies these claims and which will invariably require close scrutiny of the merits of *each* claim, thus eliminating any semblance of "typicality" element required to meet the class certification standard. Finally, at least two of the four named Plaintiffs are no longer incarcerated, rendering prospective/injunctive relief meaningless and moot as to their claims. Therefore, typicality must fail due to the individualized nature of claims and defenses, including the requirement to engage in individualized inquiry.

d. Adequacy Fails for Lack of Fairness and Individualized Protection.

The Adequacy requirement states that "[t]he representative parties must fairly and adequately protect the interests of the class. Rule 23(a)(4), SCRCP. The adequacy requirement seeks to "uncover conflicts of interest between named parties and the class they seek to represent." It calls for a determination of whether the interests and incentives between the representative plaintiffs and the rest of the class are aligned or antagonistic. Intra-class conflicts may arise when class members seek conflicting remedies, or some class members actually benefit from the challenged conduct.

Plaintiffs rely exclusively on the estimation of current and/or former inmates being "so numerous" as the putative class. However, Plaintiffs have offered nothing demonstrating that any of these yet-to-be-named inmates suffered the type of damages alleged by the presently named Plaintiffs. The named Plaintiffs remain the only identifiable class members injured as alleged in the Complaint and now Amended Complaint. Plaintiffs have not shown the numerosity of putative plaintiffs vying for the same redress. Plaintiffs' Amended Complaint and motion are based on the

highly individualized account of four (4) current and/or former inmates. By Plaintiffs' pleadings and motions, however, their claims must be examined one by one, on their own, as they have shown nothing indicating that their claims are similar to other members of the putative class. The existence of one type of case for personal injury does not establish the viability of claims of other putative plaintiffs with entirely different circumstances. Therefore, a class action is not in the interests of the putative class members.

Judicial economy favors addressing the individual claims by the individuals who are in the best position to plead their specific harms. By certifying a class, this Court would create additional hardship and burden to plaintiffs bringing their own claims. Plaintiffs are best served by articulating their individualized damages and concerns through their own counsel. The remedies sought are disparate, individualized, and are available to individuals without the need of a class. Not every adult or juvenile inmate will have the same claims, damages, nor will the same defenses be applicable. Individualized plaintiffs are in the best position, as the master of their own complaints and cases, to represent their own interests. The putative class members do not gain additional benefits from the class and a class would only add costs of providing notice, administration of the class, and paying attorneys' fees to class counsel. Individual plaintiffs are better able to shape the terms of litigation or settlement of their individual claims. Certifying the class will effectively remove the ability for individual litigants to pursue his or her best interests.

Class certification would not achieve the goals of fairness and efficiency; not for the Court, not for the Defendants, and especially not for the putative plaintiffs. Current and/or former inmates are in the best position to seek remedy for themselves rather than in the structure of a class.⁷ The

⁷ As discussed earlier, Plaintiffs' counsel is currently representing current/former SCDC inmates in *other* pending cases involving similar claims against SCDC.

Plaintiffs in this case do not need class certification for redress or compensation, they are represented by counsel and will receive no greater recovery through the class process. Instead, this Court should allow that any claims that the putative class members have against the Defendants be individually litigated. Class actions are designed to eliminate repetitious litigation and the possibility of inconsistent adjudication. However, in this case, class certification would create a license to create a mass tort of manufactured and compiled claims.

Given the number of claims and the certainty of individualized inquiry, individual litigation or joinder are sufficient and preferable vehicles to accomplish this litigation.

CONCLUSION

Class certification in this case fails to advance the objectives articulated by prior South Carolina courts considering certification. Class certification will hinder the execution of this litigation and the administration of judicial economy. The claims, facts, defenses, and damages of each putative plaintiff are highly individualized and would require the Court and parties to engage in a series of mini-trials and fact finding to adjudicate each claim. Therefore, class action status fails to provide a better procedural mechanism for resolving this litigation. This Court should deny Plaintiffs' motion for class certification.

[SIGNATURE FOLLOWING PAGE]

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Attorneys for Defendant South Carolina
Department of Corrections

January 29, 2024
Mt. Pleasant, South Carolina

CERTIFICATE OF SERVICE

I certify that on this date a copy of the foregoing was served on each party or counsel of record by mailing, emailing, e-filing, or hand delivery in the manner prescribed by the applicable Rule of Civil Procedure.

This 29 day of January, 2024.

s/Kristi Parker

cited case law and the lack of argument and case law by the Defendant against the motion, this court should certify an injunctive class.

The Damages Class Should be Certified

Defendants' memorandum in opposition fails to raise any credible argument that this court should not certify the damages class in this case.

Commonality

Defendants main theme against class certification involves claiming unique and individualized cases. The one case cited to support Defendants' theory that individual facts defeat class certification, *Gardner v. S.C. Dep't of Revenue*, 353 S.C. 1, 577 S.E.2d 190 (2003), neither supports their argument nor supports their conclusion. In *Gardner*, the Court found that a finding of liability required an individual determination of prejudice regarding the notice required to be sent to the plaintiffs by the defendants before seizing income tax refunds for delinquent debts owed to state agencies. *Id.* at 14-15. Since a finding on liability required this individual determination, the Court found the class was not certifiable. *Id.* at 22.

Here, the common legal theory is shared by all putative class members (negligence and gross negligence). *Mullen v. Treasure Chest Casino, LLC*, 186 F.3d 620, 625 (5th Cir. 1999). The individual factual situations do not matter when it comes to certification of the class when class members share the same legal theory. *Parra v. Bashas', Inc.*, 536 F.3d 975, 979 (9th Cir. 2008); *Patterson v. Gen. Motors Corp.*, 631 F.2d 476, 481 (7th Cir. 1980); *Senter v. Gen. Motors Corp.*, 532 F.2d 511, 524 (6th Cir. 1976).¹ The determinative issue on liability for the court to decide is whether Defendants breached their standard of care to the plaintiffs by failing to implement and

¹ As previously argued in the Plaintiffs memorandum in support, differences in damages claimed by class members is not considered when certifying a class. *See* Pls. Memo. in Support, p. 19.

enforce their policies and procedures to prevent sexual assaults in their facilities. If that is answered in the affirmative, that finding of liability is applicable to each putative class member and because of that, commonality is satisfied.

Additionally, Defendants do not attempt to refute the Affidavit of James Aiken submitted in support of the class certification. Mr. Aiken's testified that Defendants' failure to implement these standards directly contributed to the sexual assaults each putative class representative suffered while they were in the custody of the Defendants. Given the common legal theories shared by the putative class members and the finding of a foreseeable injury of the putative class members due to the actions of the Defendant, this case satisfies the commonality branch of the certification test.

Numerosity

Numerosity is satisfied by the Defendant's own internal annual survey of sexual assaults. *See* SCDC, *Surveys of Sexual Victimization (SSV) Reports* (Feb. 5, 2024) (available at <https://www.doc.sc.gov/preaweb>) (surveys for 2006-2022 available). From 2012-2022, SCDC reported 659 non-consensual sexual acts (42 substantiated), 161 reported abusive sexual contacts (10 substantiate), 590 acts of staff sexual misconduct (65 substantiated). Using the Defendant's own reported numbers, numerosity is clearly satisfied for SCDC.

The same data from SCDJJ is available from their annual statistical data for PREA. *See* SCDJJ, *Reports – PREA Statistical Data* (Feb. 5, 2024) (available at <https://djj.sc.gov/scdjj-facilities>). From 2012-2021, SCDJJ reported 255 abusive sexual contacts (54 were substantiated), 34 sexual harassments (7 substantiated), and 69 sexual misconducts through 2018 (6 substantiated). As reported by the Legislative Audit Council and the Department of Justice, SCDJJ

has failed to investigate or fully investigate incidents for various reasons. The data prior to 2017 appears to be under reported or not reported at all given the jump of reported incidents in 2018.

Numerosity of putative class members from the Defendants own statistical surveys supports the certification of a class in this case for both SCDC and SCDJJ.

Typicality

Defendants cannot oppose certification by making conclusory arguments that the class cannot satisfy the typicality requirement because of unique defenses applicable to certain putative class members and not others. There are certainly cases that clearly articulate unique defenses that may preclude certification, but Defendants have not presented any cases in support of their statement or how those cases support that argument in this case.²

Defendants' arguments against typicality solely focus on unidentified unique and individualized defenses for each claim by the putative class representatives. Courts have addressed these types of arguments requiring that the "opponent of class certification to make a 'sufficiently clear showing' that the alleged unique defense will occupy a significant portion of the litigation before concluding that the unique defense renders the class representative's claims atypical." 1

² During the hearing of the class certification motion, Defendants suggested that the statute of limitation is a unique defense that will need to be litigated here. Defendants appear to be unaware that the filing of a putative class action case tolls the statute of limitation for all putative class members until the denial of class certification, if that putative member elects to be excluded from the certified class after being served notification, or they elect to individually litigate their claims independent of the putative class litigation. *Crown, Cork & Seal Co., Inc. v. Parker*, 462 U.S. 345, 350, 103 S.Ct. 2392, 76 L.Ed.2d 628 (1983) ("While *American Pipe* concerned only intervenors, we conclude that the holding of that case is not to be read so narrowly. The filing of a class action tolls the statute of limitations as to all asserted members of the class, not just as to intervenors.") (citation omitted) (internal quotation marks omitted); see *American Pipe & Const. Co. v. Utah*, 414 U.S. 538, 553, 94 S.Ct. 756, 38 L.Ed.2d 713 (1974) ("[T]he commencement of the original class suit tolls the running of the statute for all purported members of the class who make timely motions to intervene after the court has found the suit inappropriate for class action status.").

Newberg and Rubenstein on Class Actions § 3:45 (6th ed.).³ Defendants have failed to address the unique and individualized defenses that they would argue against the putative class representatives outside a generalized statement that it would “likely become a major focus of the litigation.” SCDC Memo. in Opposition, p. 12, SCDJJ Memo. in Opposition, p. 8. Ironically, both Defendants’ memoranda in opposition used almost identical wording to argue there would be unique and individualized defenses that would be asserted without identifying these defenses.

“To defeat class certification, a defendant must show some degree of likelihood a unique defense will play a significant role at trial. If a court determines an asserted unique defense has no

³ Courts in these situations have found class representative’s claims atypical when a unique defense “threatens to undermine one or more substantive elements of a central claim.” 1 Newberg and Rubenstein on Class Actions § 3:45. Courts that have found unique defenses defeat class certification involved procedural bars such as *res judicata*, misrepresentation by the putative class representative, spoliation of evidence claim, or nonreliance. *Zenith Laboratories, Inc. v. Carter-Wallace, Inc.*, 530 F.2d 508, 512 (3d Cir. 1976) (finding no typicality when the defendant could assert *res judicata* against the class representative based on the disposition of counterclaims filed by the class representative against the defendant in a prior suit); *Mendell v. American Medical Response, Inc.*, 2021 WL 1102423, *7 (S.D. Cal. 2021) (finding proposed class representative atypical in invasion of privacy case where a “unique defense against [the class representative] may undermine the consent element” of the invasion of privacy claim); *Bowling v. Johnson & Johnson*, 2019 WL 1760162, *7 (S.D. N.Y. 2019) (finding proposed class representative atypical in product liability case because “Defendants have raised credible concerns about the central factual predicate of [the representative’s] claim—that she purchased [the product at issue] during the relevant period”); *Mooradian v. FCA US, LLC*, 286 F.Supp.3d 865, 870 (N.D. Ohio 2017) (finding the proposed class representative was atypical because his spoliation of evidence provided the defendant with several unique defenses against him that did not apply to the class as a whole); *Smith v. John Hancock Ins. Co.*, 2008 WL 4145709, *2 (E.D. Pa. 2008) (finding no typicality in an action by purchasers of annuity contracts alleging that an insurance company engaged in fraudulent misrepresentation by failing to disclose that the interest rate would decline sharply after the first year as the putative class representative was subject to a unique defense that she had not relied on the defendant’s misrepresentations); *Fleck v. Cablevision VII, Inc.*, 763 F.Supp. 622, 626–27 (D.D.C. 1991) (finding named plaintiff’s claims atypical because they were subject to a unique defense of nonreliance as the plaintiffs had not voted on the securities transaction at issue); *Kas v. Financial General Bankshares, Inc.*, 105 F.R.D. 453, 461–62 (D.D.C. 1984) (finding named plaintiff’s claims atypical because they were subject to a unique defense of nonreliance as defendants had voted against a proposed merger without relying on the material misstatements and omissions at issue in the case).

merit, the defense will not preclude class certification.” *Beck v. Maximus, Inc.*, 457 F.3d 291, 300 (3d Cir. 2006) (citing *Hardy v. City Optical Inc.*, 39 F.3d 765, 770 (7th Cir.1994)). Defendants here have failed to advance one unique defense or make a sufficiently clear showing that a major focus of the litigation will revolve around these unique defenses. Therefore, the court should find the plaintiffs have satisfied the typicality prong of the class certification analysis.

Adequacy

The adequacy analysis for putative class representatives is whether the putative class representative has a conflict of interest with other class members. *See* 1 Newberg and Rubenstein on Class Actions § 3:58 (6th ed.). “The adequacy of representation element is satisfied if the named Plaintiffs' interests are sufficiently aligned with those of other class members.... This element requires similarity, not identity of interests.” *Bywaters v. United States*, 196 F.R.D. 458, 468 (E.D. Tex. 2000) (quotations removed). This prong of the certification analysis does not require the court to revisit the numerosity prong in determining whether the putative class representatives can adequately protect the interests of the putative class members. Yet Defendants argue that named plaintiffs are the only identifiable class members injured as alleged in the Complaint.⁴ *See* SCDC Memo. in Opposition, p. 13-15; SCDJJ Memo. in Opposition, p. 8-9.

Defendants make the conclusory statement that “[n]ot every adult or juvenile inmate will have the same claims, damages, nor will the same defenses be applicable.” SCDC Memo. in Opposition, p. 14; *see* SCDJJ Memo. in Opposition, p. 9, but fail to support that statement with any factual evidence. The Defendants provided “no evidence of adequacy-defeating conflicts of

⁴ As argued above in the numerosity section, both Defendants have survey summaries of all documented incidents of sexual violence, substantiated, unsubstantiated, and unfounded from 2006. Those surveys were compiled from documented incidents. Most of the class can be easily identifiable using the Defendants own documents and data.

interest, such as differences in the type of relief sought, a theory of law or fact that benefits some class members, but harms others, or a scenario where some class members benefit from the Defendant's conduct." *Marcoux v. Szwed*, No. 2:15-CV-093-NT, 2016 WL 5720713, at *3 (D. Me. Oct. 3, 2016); *Menking ex rel. Menking v. Daines*, 287 F.R.D. 174, 180 (S.D.N.Y. 2012); see *Sharp Farms v. Speaks*, 917 F.3d 276, 297 (4th Cir. 2019) (finding a conflict of interest where class representatives were pursuing claims from a common cooperative reserve fund based on a different legal theory from certain class members); *Torres v. American Airlines, Inc.*, 2020 WL 3485580, *12 (N.D. Tex. 2020) ("Because the relief Plaintiffs seek, if consistently applied, would harm some class members they seek to represent, a fundamental conflict prevents the representative Plaintiffs from representing the class. For these reasons, the Court denies Plaintiffs' Motion for Class Certification."). The named Plaintiffs interests are aligned with the members of the class they seek to represent and this court should find they are adequate representatives of the class.

Conclusion

As articulated above, the Defendants' arguments provide no credible or logical argument against class certification in this case. Plaintiffs' motion for class certification is proper and appropriate and the Court should grant Plaintiffs' motion.⁵

⁵ As argued in the Plaintiffs memorandum in support of class certification and supported by the facts of this case, none of the policies and procedures adopted by SCDC and SCDJJ are different when it comes to preventing the sexual assault or inmates or residents. While the PREA standards used to create those policies are for different facility types, those standards are substantially the same requirements for both prisons and jails and juvenile facilities. See Plaintiffs Memorandum in Support of Class Certification, p. 7-8, 22-24. Class certification permits the court to create subclasses at any time as a subset of the larger class for management purposes. 3 Newberg and Rubenstein on Class Actions § 7:32 (6th ed.). At this time there is insufficient proof that subclasses are needed.

Respectfully submitted,

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This 8th day of February, 2024