

**UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY**

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ANGEL COLON, ROY SCHMITT, JUBRA'EEL LEBRON,
WINIFRED GATES, MARK HARKINS, MATTHEW
CARLEY, CECILIO TOLEDANO, and ANDREW
CRAWFORD, on behalf of themselves and all others
similarly situated,

Plaintiffs,

Case No. _____

v.

PASSAIC COUNTY, PASSAIC COUNTY BOARD OF
CHOSEN FREEHOLDERS, SONIA ROSADO in her
official capacity as Passaic County Freeholder, TANESHA
WAY, in her official capacity as Passaic County Freeholder,
PAT LEPORE, in his official capacity as Passaic County
Freeholder, TERRY DUFFY, in his official capacity as
Passaic County Freeholder, JAMES GALLAGHER, in his
official capacity as Passaic County Freeholder, BRUCE
JAMES, in his official capacity as Passaic County
Freeholder, ELEASE EVANS, in her official capacity as
Passaic County Freeholder, PASSAIC COUNTY
SHERIFF'S DEPARTMENT, JERRY SPEZIALE, in his
official capacity as Sheriff of Passaic County, CHARLES
MEYERS, in his official capacity as Warden of Passaic
County Jail, STEVEN MYERS, in his official capacity as
Deputy Warden of Passaic County Jail, and GEORGE W.
HAYMAN, in his official capacity as Commissioner of the
New Jersey Department of Corrections,

Defendants.

**ORAL ARGUMENT
REQUESTED**

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

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INTRODUCTION

This class action is brought by the named plaintiffs (“Plaintiffs”) on behalf of inmates at the Passaic County Jail (“PCJ”). Year upon year, inmates at this notorious facility are forced to endure conditions unfit for an animal, let alone a human being. These conditions include massive overcrowding, a squalid and unhygienic living environment, boiling temperatures in summer, freezing temperatures in winter, insufficient clothing, restrictions on religious freedom, beatings by correction officers, intimidation with dogs, and retaliation for the filing of legitimate grievances. According to local fire officials, PCJ is a death trap without basic detection and fire-fighting equipment. PCJ violates not only the local fire codes, but also multiple state regulations. However, the New Jersey Department of Corrections (“DOC”) permits these violations to continue by waiving compliance and by failing to take enforcement action.

The appalling conditions at PCJ are not the result of mere negligence. Instead, they are the consequence of a deliberate policy on the part of the Passaic County defendants to use the facility as a source of revenue generation or – as one state official described it – “corrections for profit.” Over the years, Passaic County has been paid over a hundred million dollars to house inmates of other government entities. Instead of using that money to expand the current facility, make necessary repairs or build a new jail, they have ploughed that money into other projects and used it to balance the County budget.

Different federal judges have referred to PCJ as “a notably deplorable institution” with conditions that are “absolutely intolerable,” “degrading,” “shameful,” “overly

punitive,” “not right” and “not human.”¹ Yet the situation continues unabated year after year. This action seeks to put an end to this barbarism once and for all.

In this motion, Plaintiffs seek certification of the following class under Rule 23(b)(2): all persons who are now or will become incarcerated at PCJ during the pendency of this lawsuit.

STATEMENT OF FACTS

I. THE SHAMEFUL HISTORY OF PCJ

A. 1970s

For many years, Passaic County has enjoyed the dubious reputation of running one of the worst jails in the entire country. Over thirty years ago, a class action was filed by PCJ inmates challenging conditions at the then-existing jail, naming as defendants the Sheriff of Passaic County, the PCJ Warden, individual members of the Passaic County Board of Chosen Freeholders, and their successors-in-office. Valentine v. Englehardt, Civil Action No. 78-270 (D.N.J., filed Feb 8, 1978). (Ex. 2).² The jail as it then existed was designed to hold 227 inmates, but frequently held over 500. The Valentine plaintiffs complained, inter alia, of overcrowding, unsanitary living conditions, nutritionally

¹ See U.S. v. Servidio, 2008 WL 352866, at *1 (D.N.J. Feb. 7, 2008) (Judge Martini); U.S. v. Ortiz, 2007 WL 4208802, at *5 (D.N.J. Nov. 27, 2007) (Judge Hayden); U.S. v. Sutton, 2007 WL 3170128, at *1, 8 (D.N.J. Oct. 25, 2007) (Judge Hayden); U.S. v. Sanchez, Crim. No. 05-318, Transcript of Sentencing Hearing, at 13 (D.N.J. Aug. 3, 2006) (Judge Bassler). (Ex. 1).

² The exhibits referenced in this motion are attached to the accompanying Certification of Christopher J. Michie dated September 3, 2008.

deficient food, and restricted access to the courts. Amended Complaint ¶¶ 19-21, 23-56. (Ex. 3).

After the class was certified, the Board, Sheriff and Warden agreed to settle the Valentine litigation. Characterizing the agreement, the Court stated that:

The settlement requires that the defendants take various actions to ensure the cleanliness and suitability of the inmates' living areas, clothing and food ... Inmates will be assured of access to toilet facilities and those facilities will be screened from the view of other inmates. In sum, the settlement agreement provides for a vast improvement in the living conditions and treatment of Passaic County Jail inmates.

Valentine v. Englehardt, 474 F.Supp. 294, 297-98 (D.N.J. 1979).

B. 1980s

Unfortunately the Court's optimism proved unfounded. In September of 1981, just eighteen months after the settlement, former New Jersey Governor Thomas Kean toured the facility. An article in the Philadelphia Inquirer reported his reaction:

The tour lasted less than 20 minutes. He left shaken, his face white, stumbling for words.

What he saw he called an "embarrassment."

Philadelphia Inquirer, Mar. 1, 1983. (Ex. 5). The article then went on to describe the conditions inside the prison:

Men lay everywhere in a labyrinth of bodies in the second-floor cellblock of the Passaic County Jail.

Some sat on steel benches, writing letters or trying to watch television through the bars. They were surrounded by dozens of men on mattresses on the floor. Wrapped in gray blankets or sheets, they tried to sleep despite the constant noise.

Some inmates had created makeshift hammocks by tying their sheets to the

bars. This allowed them the luxury of resting several feet above the crowded floor. Clotheslines hung with drying laundry crisscrossed the cellblock. With no place to put personal possessions, inmates had crammed their books and shoes between the bars.

This cellblock was designed for a maximum of 16; on Feb. 8, it held 36. The three other cellblocks on this wing each held more than 30 men.

In the jail's psychiatric wing on the second floor, 25 men were housed in a dormitory designed to hold a maximum of 12. Guards sit outside the dormitory 24 hours a day on "suicide watch."

Id.³

C. 1990s

In 1992, the New Jersey Record ran a series of articles on conditions at PCJ. Amidst the many allegations of overcrowding and brutality against inmates, the articles also reported on interviews with former employees:

- Felipe Clemente, a former guard, explained how PCJ's top officers persuaded inmates to commit perjury about jail conditions:

"They get guys and they promise guys time off or a weekend at home or anything that they feel can make the guy go and testify and lie."

³ Massive overcrowding has been a consistent feature of PCJ for the last quarter century. In May of 1985, the New York Times reported that PCJ was housing 778 inmates, over three times its then-capacity of 227. New York Times, May 12, 1985. (Ex. 6). In 1989, the then-Sheriff told the same newspaper that "as many as 102 women [were] crowded into a day room designed for no more than 40," and that "[m]attresses covered almost every bit of floor space." New York Times, Apr. 30, 1989. (Ex. 7). In 2005, a Sheriff's Department spokesman told another newspaper that "[t]he jail is overcrowded, with more than 2,000 total inmates in a facility with a maximum capacity of 800." Bergen County Record, Dec. 9, 2005. (Ex. 8). In short, as the current Warden testified recently, PCJ "has been overcrowded for at least 20 years." See U.S. v. Sutton, Crim. No. 07-426 (D.N.J.), Sept. 28, 2007 Hearing Transcript ("9/28 Sutton Transcript") at 7. (Ex. 9).

- Hannah Allen, a former guard, explained how, in the wake of the Valentine settlement requiring the installation of a toilet and sink in isolation cells, the correction officers found a way to circumvent the agreement:

“They cut the water off to the toilet. They cut the water off to the sink. So anybody that uses the bathroom, whatever you got to do, you’ve got to sit in there with it.”

- Former warden (and future New York City Police Commissioner) Bernard Kerik summed up conditions at PCJ:

“It’s a bad, bad jail. It’s run on fear. . . . That’s a volcano waiting to happen.”

New Jersey Record, Apr. 12 and 15, 1992 (Exs. 10 and 11).

II. REVENUE GENERATION – “CORRECTIONS FOR PROFIT”

Overcrowding at PCJ is no accident. Rather, it is the consequence of a deliberate policy adopted by Passaic County’s Board of Chosen Freeholders which is designed to generate as much revenue as possible for the County. This revenue is used for non-jail related projects and to balance the County budget.

For over 20 years, PCJ has housed inmates on behalf of the State of New Jersey and the federal government in exchange for a daily fee. 9/28 Sutton Transcript at 11-12. According to budget documents, the County realized \$10,085,615.88 in revenue from the housing of federal inmates in 2006, plus an additional \$3,900,000.00 in outstanding receivables for the prior year. (Ex. 12). It also received \$4,403,019.00 from the State. Last year, the revenues were \$12,324,290.00 (federal) and \$5,238,731.00 (state). (Ex. 13). At the same time, a Sheriff’s Department spokesman has stated that “most years the jail requests less than \$150,000 for maintenance.” Bergen County Record, Mar. 13, 2004. (Ex. 14).

According to the Warden, the external revenue generated by PCJ “goes into the general funds” of the County. 9/28 Sutton Hearing at 14. As he explains the situation, the “Freeholders have gotten accustomed to the revenue that comes in, if it were to evaporate very quickly, it would leave a vacuum that would be difficult to fill ...” Id. Joseph Hartmann, from the New Jersey Department of Corrections, characterized this policy as “corrections for profit.” Id. at 79.⁴

The PCJ revenue faucet came under threat recently after the Department of Homeland Security’s Inspector General conducted an investigation into conditions at the facility. See Dept. of Homeland Security, Office of Inspector General, Treatment of Immigration Detainees Housed at ICE Facilities (Dec. 2006) (“OIG Report”). (Ex. 16).⁵ The OIG Report found numerous deficiencies in the treatment of federal detainees at PCJ, including but not limited to inadequate health care, evidence of rats, mice and cockroaches in the units, inadequate ventilation, and insufficient inmate clothing. Id. at 4-5, 8-10, 16, 22-23.

⁴ The County does not hesitate to spend money on other projects. For example, late last year, it opened a new 41,000 square foot Investigative Headquarters for the Passaic County Prosecutor’s Office. The County spent \$4.9 million to build the facility and a further \$4.7 million on “state of the art” equipment. Press Release, Passaic County Prosecutor’s Investigative Headquarters Opens in Totowa (Oct. 29, 2007) (Ex. 15).

⁵ The Passaic County Sheriff ejected the federal investigators from the jail on July 21, 2005, accusing them of arrogance and incompetence. Bergen County Record, Aug. 17, 2005. (Ex. 17). A Sheriff’s Department spokesman stated that “they don’t know what they are talking about, and they are a disgrace to the federal government ... Investigators ordered jail personnel around, made unfounded accusations and asked the department’s Internal Affairs Division to review allegations.” Id. After the federal investigators were permitted to reenter the facility, they finished the investigation and issued the Report.

The OIG Report noted that “[a]fter the completion of [the] review, ICE removed all immigration detainees that had been housed at PCJ and transferred them to other facilities.” OIG Report at 42. In 2007 and early 2008, after several criminal defendants received downward departures in their sentences as a result of the conditions they had been forced to endure,⁶ all remaining federal inmates were removed from PCJ. Bergen County Record, Mar. 29, 2008. (Ex. 18).

In response to the loss of over \$10 million in anticipated revenue, the Sheriff contacted corrections officials in other states, which resulted in a recent agreement with the City of Philadelphia to house up to 300 of its inmates. Bergen County Record, Mar. 29, 2008; May 15, 2008. (Ex. 19).⁷ According to the County Auditor, this agreement “could potentially restore more than \$5 million to the proposed 2008 budget.” Id.

At the time of the negotiations, a Sheriff’s Department spokesman stated that “[n]ow that the jail has been hovering around 1,500, we certainly feel that there is capacity for additional inmates without having issues of overcrowding ...” Bergen County Record, Mar. 18, 2008. (Ex. 21). As the Warden testified, however, PCJ has a design capacity of only 896. 9/28 Sutton Transcript at 7-8.

⁶ See, e.g., U.S. v. Garcia-Morena, 214 Fed. Appx. 134 (3d Cir. 2007) (affirming downward departure due to the conditions of pre-trial confinement in PCJ); Sanchez v. U.S., 2008 WL 141214, at *5 (D.N.J. Jan. 11, 2008); U.S. v. Ortiz, 2007 WL 4208802, at *6; Sutton, 2007 WL 3170128, at *9-10.

⁷ Ironically, the City of Philadelphia entered into this agreement as part of its effort to comply with a federal injunction requiring it to take “affirmative steps to redress the unconstitutional conditions” stemming from overcrowding in its own correctional system. See Bowers v. City of Philadelphia, No. 06-CV-3229 (Memorandum and Order) (E.D. Pa. Jan. 25, 2007). (Ex. 20).

III. PRESENT CONDITIONS AT PCJ

A. Overcrowding

At a criminal sentencing hearing before Judge Hayden last fall, the Warden testified that:

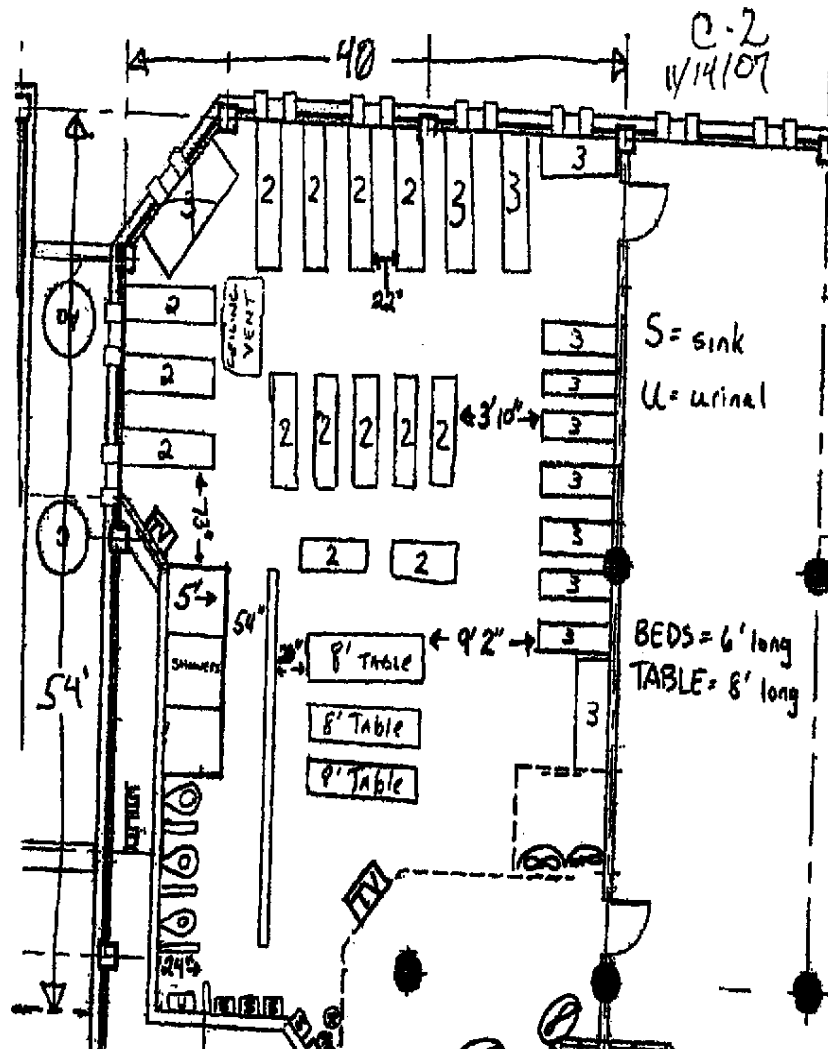
- While PCJ has a capacity of 896 inmates, the facility housed an average of “1900 [inmates], give or take 10 or 15 percent.”
- PCJ consists of two types of housing, large dormitory-style units and cells.
- Most of PCJ’s inmates are housed in the dormitory-style units, in which they spend an average of 23 hours a day.
- Each of these units is approximately 54 x 40 feet and houses up to 64 inmates.
- To accommodate 64 inmates, each unit contains double and triple bunk beds that are 22 inches apart.
- Inmates must eat, sleep, bathe, urinate and defecate in these units.

9/28 Sutton Transcript at 18; Oct. 1, 2007 Hearing Transcript (“10/1 Sutton Transcript”) at 8, 22-23, 32. (Ex. 22).⁸

As Plaintiff Mark Harkins explains in his Certification, there are three toilets, one urinal, three showers and four sinks in his unit. Certification of Mark Harkins dated Sept.

⁸ Other dormitory-type units are similarly overcrowded. Plaintiff Cecilio Toledano is housed in Unit 3G2, which is approximately 30 x 20 feet, and houses between 30 and 40 inmates. Certification of Cecilio Toledano dated Aug. 18, 2008 (“Toledano Cert.”) ¶¶ 5-6. Most of the inmates are assigned to triple bunks, but the space between the bunks is so tight that inmates have to walk sideways to move between them. Id. ¶ 6. The vertical space between the bunks, which have been retrofitted to accommodate three men, is so small that inmates cannot sit up in bed without bumping their heads. Certification of Matthew Carley dated Sept. 2, 2008 (“Carley Cert.”) ¶ 6; Certification of Jubra’eel Lebron dated Sept. 2, 2008 (“Lebron Cert.”) ¶ 18.

2, 2008 ("Harkins Cert.") ¶ 5. A diagram provided by the Warden during the Sutton hearing illustrates the unit's configuration:



B. Unsanitary Living Conditions

As the diagram demonstrates, toilet and shower facilities are located within the same room in which the inmates eat and sleep. 9/28 Sutton Transcript at 23. As the Warden testified, this means that inmates have to eat their meals within six feet of other inmates who are defecating. Id. at 29-30. Since there is no vapor barrier, inmates are forced to pull their T-shirts over their faces to avoid the smell of feces. 10/1 Sutton

Transcript at 110; see also Lebron Cert. ¶ 16 (the smell is “horrible”). Because of inadequate plumbing, sewage backups from the toilets or water overflow from the sinks are common, Carley Cert. ¶ 11, and the floor drains in the units also become clogged, which results in sewage backing up onto the unit floor. 10/1 Sutton Transcript at 112.

The few toilets and showers available to the inmates often do not function. For example, an inmate recently testified that one of the showers in his unit was not working for seven months and that no attempt was made to repair it. 10/1 Sutton Transcript at 106-07. Plaintiffs Harkins and Crawford explain that only two of the three showers work in their unit, which approximately 60 inmates have to share. Harkins Cert. ¶ 5; Certification of Andrew Crawford dated Sept. 2, 2008 (“Crawford Cert.”) ¶ 3.

When inmates are able to access a functioning shower, the water is either unbearably cold or scalding hot. Crawford Cert. ¶ 3. 10/1 Sutton Transcript at 107-08. The OIG Report “confirmed this unsafe condition in the female housing units during [its] review.” OIG Report at 16.

These already-disgusting conditions are further exacerbated by rodent and insect infestation in the units. The OIG Report indicated that of nine pest control service reports made available for the inspectors’ review, eight of the nine reports indicated evidence of rats/mice and cockroaches. OIG Report at 9. Plaintiff Carley has seen “huge roaches – about three inches long – coming off the food carts and scurrying around the floor.” Carley Cert. ¶ 15. Plaintiff Angel Colon explains that:

[T]here are mice running all over Unit 3-5. When I say “mice,” I mean whole families of mice. I regularly see at least six or seven mice running

around the unit, especially after breakfast time when the inmates are quieter and trying to sleep.

Certification of Angel Colon dated Sept. 2, 2008 ("Colon Cert.") ¶ 24; see also Carley Cert. ¶ 14 ("the unit is plagued by insects").

C. Unsafe and Inadequate Food

At a recent hearing, the Warden candidly acknowledged that inmates sometimes find that their food has been eaten by mice. 9/28 Sutton Transcript at 52; see also Ortiz, 2007 WL 4208802, at *2 (recounting inmate testimony that "he never ate the prison meals after he found a roach in his food" and "[t]here were days he went hungry rather than eat"); Crawford Cert. ¶ 7 ("food is often delivered with rodent droppings or rodent bite marks through the packaging").

In addition to contamination, the amount of food served to inmates is inadequate. As Plaintiff Winifred Gates explains, "[t]he portions are tiny, and it often feels like the amount of food we are given would barely feed a child." Certification of Winifred Gates dated Sept. 2, 2008 ("Gates Cert.") ¶ 12. Since he cannot afford to purchase extra food from the jail's commissary, he is often very hungry. Id. Andrew Crawford, on the other hand, purchases most of his food from the commissary to ensure that he receives sufficient nutrition. Crawford Cert. ¶ 29. Plaintiff Carley believes that he has lost at least 30 pounds since being detained at PCJ. Carley Cert. ¶ 20.

Moreover, the food provided to inmates is sometimes stale or raw. 10/1 Sutton Transcript at 113-14. The OIG examined two instances where undercooked poultry was served to PCJ detainees. It reported that:

In the first instance, on October 14, 2005, a detainee gave us a piece of undercooked poultry served on the previous day. When presented with the undercooked piece of poultry, both PCJ officials and PCJ food service contractor agreed it was undercooked.

In the second instance, on October 28, 2005, a PCJ detainee gave us a grievance form, signed by 57 male detainees, stating that 10 people got sick from eating chicken. We reviewed the completed checklist for that day, which indicated that the oven temperature used to cook the poultry was not according to the new checklist procedures.

OIG Report at 11 (emphasis added).

D. Inadequate Ventilation, Heating and Cooling

In the 1979 Valentine settlement, the defendants agreed to provide “healthful ventilation, heating and cooling” at PCJ. That turned out to be an empty promise. As the court’s recent opinion in Sutton explained:

There is no air-conditioning and temperatures reach 100 degrees, according to Warden Meyers, in the summer; and in the winter, Sutton testified, it is so cold that prisoners can see their breath and there is ice crystallizing on the walls. In order to provide ventilation, prisoners in 2G-4 utilize a primitive red light/green light blower system whereby the red light brings in air from outside and the green light pulls out the internal air. But however putrid the inside air becomes (more on that below), Sutton testified that bringing in the outside air actually makes things worse because of what gets dumped into the room: “Just a big cloud of fiber, white dust, dirt, fiber and whoever’s bunk was directly under it, they would have to take everything off the bunk and shake everything out.”

2007 WL 3170128, at *2.

The excessive heat poses a serious risk to the inmates’ health. For example, Plaintiff Colon has a serious asthma condition which has been made “much much worse by the heat” in his unit. Colon. Cert. ¶ 16. Because of the extreme temperature, he has had chest pains, coughing fits and often finds it difficult to breathe. Id.; see also Ortiz,

2007 WL 4208802, at *2 (recounting inmate's similar testimony that "[t]he heat was so great that it was hard to breathe"). Plaintiff Jubra'eel Lebron reports that he has had a lot of trouble sleeping because of the heat. Lebron Cert. ¶ 21. Even if he manages to doze off, it is not long before he wakes up soaked in sweat. *Id.*; see also Harkins Cert. ¶ 15 ("over time, the heat has begun to feel like a form of torture"). In fact, Warden Meyers has testified that the units are sometimes so hot that it is "typical for inmates to walk around in their jockey shorts" to escape the heat. 9/28 Sutton Transcript at 35-36.

The conditions in winter pose similar risks to the inmates. Plaintiff Crawford describes the units as "unbearably cold" in the winter. Crawford Cert. ¶ 9. While Plaintiff Gates was "lucky enough to get an extra blanket," "some guys were not so lucky because there weren't enough blankets to go around." Gates Cert. ¶ 9. PCJ provides its inmates with one uniform consisting of a short-sleeved shirt and draw string pants. 9/28 Sutton Transcript at 46. It provides no additional clothing in the winter to help inmates insulate themselves from the cold. 10/1 Sutton Transcript at 117. Inmates who have enough money buy thermal shirts from the commissary; other inmates have to wrap themselves in their blankets in an attempt to keep warm. Crawford Cert. ¶ 9.

This situation is further exacerbated by the fact that PCJ does not provide any replacement clothing while uniforms are being laundered. 9/28 Sutton Transcript at 46-47; see also OIG Report at 22 (confirming practice). Thus inmates must strip down to their underwear if they want their clothes washed. Gates Cert. ¶ 10.

Sometimes the laundry is picked up at 3:30 or 4:00 a.m. and not returned until the evening, so [we] have to spend more than 12 hours in our

underwear, which is very difficult to do with it being so cold in the unit ... I have had numerous colds and sore throats.

Id. The Warden attributes the absence of replacement uniforms to (1) a lack of money to buy them and (2) insufficient space to store them. 10/1 Sutton Transcript at 30-31.

F. Fire Detection and Alarm Systems, and Firefighting Equipment

Perhaps the most immediate threat to PCJ inmates is the lack of basic fire safety.

As the Sutton court explained:

[T]here is the greatly increased risk of loss of life should there be a fire. There is no sprinkler system in any of the prisoner units. The fire alarm panel, at the time that the city Fire Inspector testified, had a blinking "trouble" light. He did not know if the alarm system could actually send a signal to the fire department in an emergency. Passaic County Jail has not been in compliance with municipal fire regulations for years and as of the hearing in Sutton's case, despite seven extensions of time to come up to code, it was still in violation.

City of Paterson Fire Inspector Samuel Gaita was particularly effective in describing the problems unique to safeguarding a correctional facility from being destroyed in a fire. In an emergency, unlike other public buildings, a jail or prison goes into lockdown so that corrections staff can assess and control the situation. If a fire breaks out, the public safety consideration behind the lockdown needs to be reconciled with the rescue of staff and inmates. So fire regulations require a "passive" fire protection system that uses an alarm coupled with a sprinkler system and does not need human effort to function. But in Passaic County Jail only the offices and the medical unit have sprinklers; Fire Inspector Gaita testified that elsewhere fire safety is addressed by a fire watch (a corrections officer assigned each shift to patrol unoccupied areas), a manual hose system, and fire extinguishers placed in various areas. This directly violates the requirement of a passive fire system, and has been the subject of regular interaction between jail personnel and the Paterson Fire Department since 2002, the year a fire broke out in the basement of the jail.

* * *

In a fire, Fire Inspector Gaita noted that smoke would make evacuation and response very difficult. He said he asked officials during his inspection for

the occupancy load of the building, and was not given the information or the occupancy certificate. He was specific that overcrowding in his opinion increased the risk of fire; he also testified that no risk assessment had been done concerning fire safety at Passaic County Jail.

Sutton, 2007 WL 3170128, at *2-3; see also 9/28 Sutton Transcript at 39, 42; 10/1 Sutton Transcript at 63-66, 68, 70-73, 74, 88-82.

G. Use of Dogs to Intimidate and Attack Inmates

In 2004, National Public Radio (“NPR”) spent five months conducting an investigation into conditions at PCJ.⁹ The resulting radio broadcast contained interviews with several PCJ inmates, all of whom alleged that barking snarling dogs were used by correction officers to intimidate them. NPR Broadcast at 3:40 – 5:15; 6:32-8:16; see also 10/1 Sutton Transcript at 121-22 (describing dogs barking and howling during unit searches). One inmate described how he was bitten by a dog during a beating from correction officers. NPR Broadcast at 13:00 – 17:30.¹⁰ A lawyer also explained how he was “lunged at” by an angry dog while waiting for a client. Id. at 8:17 – 8:47.

⁹ The resulting NPR Broadcast is available on the Internet at:

<http://www.npr.org/templates/story/story.php?storyId=4170152>

The Broadcast is 22 minutes long. Citations indicate the minute and second of the Broadcast at which the relevant discussion takes place.

¹⁰ While a Sheriff’s Department spokesman denied this claim on the Broadcast, stating that there were no instances of harm, no complaints, and that “no one went to hospital” as a result of dog bites, Broadcast at 11:30 – 11:33, documents obtained by the investigators proved this that this statement was untrue. Id. at 11:34 – 12:00; see also July 16, 2004 INS Treatment Authorization (referring to multiple dog bites on left arm and forearm of inmate) (Ex. 23); Passaic County Sheriff’s Department Incident Report dated May 10, 2004 (describing incident between ten correction officers and one inmate during which inmate was bitten by a PCJ dog). (Ex. 24).

The day after the NPR Broadcast, the federal government prohibited the use of canine units with federal detainees at PCJ. Bergen County Record, Dec. 29, 2005. (Ex. 25). However, the facility continues to use the dogs for what a Sheriff's Department spokesman characterized as "behavior modification." Id. These dogs "scare the living daylights" out of the inmates at PCJ. Carley Cert. ¶ 35.

At a recent hearing, both the Warden and an official from the Department of Corrections testified that PCJ is the only New Jersey jail they know of that uses dogs at all in its facility, far less in this heinous fashion. 10/1 Sutton Transcript at 12-13; 46-47.

H. Threat of Inmate Violence

Overcrowding creates a dangerously tense atmosphere, leading to a disproportionately high level of tension and violence. In Sutton, the defendant inmate testified that:

[Y]ou had more assaults in my dorm because of the overcrowding. People who were agitated at the slightest little thing, they would fight. The slightest, you know, like cut in front of somebody in the line to use the urinal. I [have] seen fights generated because of that ... There's been fights in every month since I have been there.

10/1 Sutton Transcript at 125-26; see also Ortiz, 2007 WL 4208802, at *2 (recounting inmate's testimony that "a fight broke out because an inmate taking a shower splashed water on a letter another inmate was writing at the tables located a few feet away" and that "inmate fighting was a constant concern"); Toledano Cert. ¶ 8 (crowding in the unit results in fights); Crawford Cert. ¶ 4 (same). This is further exacerbated by the extreme heat. Harkins Cert. ¶ 16. As Joseph Hartmann from the DOC testified in Sutton, overcrowding "raises the level of assaults of violence among the inmate population ...

everybody is just on top of each other and that certainly raises the tension level ..." 9/28 Sutton Transcript at 75-76.

I. Pattern of Excessive Force by Correction Officers

For years, PCJ inmates have complained about beatings at the hands of correction officers. For example, Plaintiff Roy Schmitt suffers from severe depression. Certification of Roy Schmitt dated Sept. 2, 2008 ("Schmitt Cert.") ¶ 3. Earlier this year, he was beaten by correction officers after he attempted to commit suicide. Earlier in the day, Schmitt had informed correction officials that he was feeling suicidal. Id. ¶ 13. He was taken to a part of the jail known as the "receiving area," where he was held for several hours. Feeling hopeless and depressed, Schmitt took a sheet, tied one end around his neck and the other to a metal piece at the top of a nearby door, climbed on a bench, and succeeded in hanging himself momentarily. Id. ¶ 14. Several correction officers interceded and held Schmitt up so that he would not hang. Before taking him down, however, officers punched him in the body. After Schmitt was untied, he was placed on the floor and kicked several times. Id. An officer then took the sheet, which was still tied to Schmitt's neck, and dragged him down the hallway. Id. Fortunately a nurse on duty saw what was happening and told the officers to stop. The nurse then directed the officers to bring Schmitt to the medical area, where the nurse examined him. Id. ¶ 15. Concerned that his neck had been seriously injured when he attempted to hang himself, the nurse sent Schmitt to St. Joseph's Hospital, where he was given a neck brace. Id. ¶ 16. He was then taken to a psychiatric facility, where he remained for approximately five weeks. Id.

This is just one example of this practice. See, e.g., Carley Cert. ¶¶ 32-33; Crawford Cert. ¶¶ 16-17; Toledano Cert. ¶¶ 17-19 (all recounting similar events). In fact, beatings are so common that PCJ inmates consider them an ordinary part of living there.

J. Restrictions on Inmates' Right to Practice Their Religion

The right of PCJ inmates to practice their religion has been also been curtailed by the prison authorities. For example, Plaintiffs Cecilio Tolendano and Jubra'eel Lebron are Muslims. Islam requires male adherents participate in congregational prayer services – known as “Jumu-ah” – every Friday. Toledano Cert. ¶ 13; Lebron Cert. ¶ 29. PCJ has permitted such services on only a handful of occasions over the past year. Id. The same complaint is raised by inmates of other faiths. See, e.g., Gates Cert. ¶ 31. The Warden attributes the difficulty in conducting such services and other programs to overcrowding. 10/1 Sutton Transcript at 29.

K. Retaliation for the Filing of Grievances

Inmates who file grievances about conditions at PCJ experience retaliation in various forms. Plaintiff Lebron's case presents one example. On June 17, 2008, he filed a grievance about the conditions at PCJ. Later that day, he was transferred from the “2 Main Trustee” unit to the 3-5 unit. Lebron Cert. ¶ 10. “Trustee” units are reserved for selected inmates based on their good behavior. Id. ¶ 4. Once selected, Trustee inmates are paid a small salary, given extra food, and enjoy greater freedom of movement than other inmates. Id. When Lebron was transferred, he was placed in an ordinary housing unit – thus losing his Trustee position and the associated privileges. Id. ¶ 11. A correction officer subsequently told him: “you better stop filing grievances.” Id. ¶ 12.

Again, this is not an isolated instance. Plaintiff Gates, who is 54 years old, was housed in 4 Main Annex, which is populated by older inmates. Gates Cert. ¶ 17. The day after he filed his grievance, he was transferred to Unit 3-6, which houses a lot of gang members. Id. ¶¶ 13, 16-18. Plaintiff Crawford's legal papers were confiscated after he had the temerity to file a grievance about conditions at PCJ. Crawford Cert. ¶ 22.

IV. THE STATE DEPARTMENT OF CORRECTIONS' POLICY OF DELIBERATE INDIFFERENCE TO CONDITIONS AT PCJ

Joseph Hartmann is the Coordinator of the Office of County Services in the New Jersey Department of Corrections, which conducts inspections of the county correctional facilities throughout the state "to determine compliance with New Jersey Administrative Code 10A-31." 9/28 Sutton Transcript at 57. At the Sutton hearing, he openly acknowledged that PCJ is in violation of countless regulations. Summarizing his testimony, the court explained that:

In a nutshell, the Department of Corrections inspects the facility annually, and inevitably finds, because too many people are crammed together, violations of the administrative code; then Passaic County asks for and is granted a temporary rule exemption to excuse the violations. Rather than being a temporary remedy the practice has been ongoing for Passaic County Jail, it appears, since the incarceration boom that began in the 1970s. Hartmann testified that of all county jails in New Jersey, only Passaic County Jail has been living on waivers.

Sutton, 2007 WL 3170128, at *3. Waivers are permitted only where the facility "is in compliance with the general intent and purpose of the minimum standards" and where "requiring the facility to comply strictly with all requirements of the minimum standards would result in an undue hardship to the overall management of the ... facility." N.J.A.C. 10A:31-2.1(d). In all other circumstances, the DOC is obligated to demand that the

violations be cured or take steps to “depopulate” the facility. See N.J.A.C. 10A:31-2.5.¹¹ PCJ does not, and has never, met the requirements for waivers. Depopulation should have been ordered years ago. But the DOC has taken no action. The Sutton opinion explains why:

Hartmann attributed the unwillingness to apply the immediate remedy of “depopulation” (i.e., doing what other counties have done and refusing to take [federal] prisoners because to do so would create unacceptable overcrowding) to Passaic County’s reliance on the revenue stream from housing nonlocal prisoners, which he has characterized as “corrections for profit.”

Sutton, 2007 WL 3170128, at *4.

V. THE PARTIES

A. The Plaintiffs And The Proposed Class

This action is brought by eight current inmates at PCJ:

- Angel Colon, a 59 year-old inmate who has been detained at PCJ for approximately four months. He is a pre-trial detainee who has accepted a plea and is awaiting sentencing.
- Roy Schmitt, a 25 year-old inmate who been detained at PCJ since January of 2008 and is currently serving a sentence of less than a year.
- Jubra’eel Lebron, a 46 year-old inmate who has been detained at PCJ since August of 2008. He is a pre-trial detainee who has accepted a plea and is awaiting sentencing.
- Winifred Gates, a 54 year-old inmate who has been detained at PCJ since September of 2007. He is a pre-trial detainee who has accepted a plea and is awaiting sentencing.

¹¹ Depopulation involves an order from the DOC prohibiting (a) the acceptance of state inmates immediately, (b) the acceptance of new inmates sentenced to serve terms in PCJ after 30 days, and (c) the acceptance of all persons sent to the facility after 90 days. N.J.A.C. 10A:31-2.5.

- Mark Harkins, a 27 year-old inmate who has been detained at PCJ since May of 2008. He is a pre-trial detainee who has pled guilty and is awaiting sentencing.
- Matthew Carley, a 47 year-old inmate who has been detained at PCJ since August of 2005. He is a pre-trial detainee who has pled guilty and is awaiting sentencing.
- Cecilio Toledano, a 50 year-old inmate who has been detained at PCJ since January of 2008. He is a pre-trial detainee who has not been tried or convicted.
- Andrew Crawford, a 22 year-old inmate who has been detained at PCJ since May of 2007. He is a pre-trial detainee who has not been tried or convicted.

Plaintiffs seek to represent the following class: all persons who are now or will become incarcerated at PCJ during the pendency of this lawsuit.

B. The Defendants

This lawsuit names as defendants Passaic County, the Passaic County Board of Chosen Freeholders and its individual members, the Passaic County Sheriff's Department, the Sheriff, the Warden and Deputy Warden of PCJ, and the Commissioner of the DOC. All of the defendants are sued in their official capacities.

LEGAL ARGUMENT

In order to obtain class certification, Plaintiffs must establish that all four requisites of Rule 23(a) and at least one part of Rule 23(b) are met. Amchem Prods., Inc. v. Windsor, 521 U.S. 591, 613-14 (1997). In this case, Plaintiffs seek certification pursuant to Rule 23(b)(2), which “permits class actions for declaratory or injunctive relief where ‘the party opposing the class has acted or refused to act on grounds generally applicable to the class.’” Id. at 614.

I. RULE 23(A)(1)’S NUMEROSITY REQUIREMENT IS SATISFIED

The proposed class meets the numerosity requirement of Rule 23(a). “No minimum number of plaintiffs is required to maintain a suit as a class action, but generally if the named plaintiff demonstrates that the potential number of plaintiffs exceeds 40, the first prong of Rule 23(a) has been met.” Stewart v. Abraham, 275 F.3d 220, 226-27 (3d Cir. 2001). The class here consists of an inmate population that has fluctuated in number between 1500 and over 2000 inmates. Thus the numerosity requirement is satisfied.

II. RULE 23(A)(2)’S COMMONALITY REQUIREMENT IS SATISFIED

Rule 23(a)(2) requires that “there are questions of law or fact common to the class.” “The commonality requirement is satisfied if the named plaintiffs share at least one question of fact or law with the grievances of the prospective class.” Johnston v. HBO Film Mgmt., 265 F.3d 178, 184 (3d Cir. 2001) (emphasis added). This case abounds with common issues.

An Eighth Amendment claim by a convicted inmate against a prison official has

two requirements: (1) “the deprivation alleged must be, objectively, sufficiently serious,” (i.e., that the defendants’ policies and practices, or lack thereof, resulted in the denial of “the minimal civilized measure of life’s necessities”), and (2) the “prison official must have a sufficiently culpable state of mind,” (i.e., that the official “knows that inmates face a substantial risk of serious harm and disregard that risk by failing to take reasonable measures to abate it”). Farmer v. Brennan, 511 U.S. 825, 834 (1994); Beers-Capitol v. Whetzel, 256 F.3d 120, 125 (3d Cir. 2001).

“Pretrial detainees are entitled to greater constitutional protection than that provided by the Eighth Amendment.” Hubbard v. Taylor, 399 F.3d 150, 166, 167 n.23 (3d Cir. 2005). Under the Due Process Clause of the Fourteenth Amendment, the court must determine if the “disability is imposed for the purpose of punishment or whether it is but an incident of some other legitimate governmental purpose.” Bell v. Wolfish, 441 U.S. 520, 545 (1979); see also Hubbard, 399 F.3d at 165. “In assessing whether the conditions are reasonably related to the assigned purposes, [the court] must further inquire as to whether these conditions cause [inmates] to endure [such] genuine privations and hardship over an extended period of time, that the adverse conditions become excessive in relation to the purposes assigned to them.” Id. at 159-160.

Plaintiffs’ Free Exercise Claim is subject to a four-part test: (1) whether there is a valid, rational connection between the prison regulation and the legitimate governmental interest put forward to justify it; (2) whether there are alternative means of exercising the right that remains open to prison inmates; (3) the impact accommodation of the asserted constitutional right will have on guards and other inmates, and on the allocation of prison

resources generally, and (4) the absence of ready alternatives. Turner v. Safley, 482 U.S. 78, 89-90 (1987). Plaintiffs' retaliation claim is subject to a three-part test – (1) whether the conduct leading to the retaliation was constitutionally protected, (2) whether inmates filing grievances suffered some “adverse action” at the hands of prison officials,” and (3) whether the constitutionally protected conduct was “a substantial or motivating factor” in the retaliation. Rauser v. Horn, 241 F.3d 330, 333-34 (3d Cir. 2001).

These inquiries raise a host of common factual questions relating to the conditions to which both the Plaintiffs and all PCJ inmates are exposed on a daily basis (e.g., overcrowding, unsanitary living conditions, inadequate ventilation, heating and cooling, insufficient clothing, etc.) as well as the defendants' actions, knowledge, and motivations. The question of whether those common facts violate the Constitution present legal questions which can also be resolved with common proof. Likewise, the appropriate form of relief to address these violations is a common question. As the court explained in Dittimus-Bey v. Taylor, 244 F.R.D. 284 (D.N.J. 2007):

The class claim presents common questions [concerning] whether Defendants subjected Plaintiffs to severe overcrowding and are therefore liable for violating the rights of pretrial detainees ... to Due Process under the Fourteenth Amendment and the rights of convicted prisoners ... to be free from cruel and unusual punishment under the Eighth Amendment, and, if so, what the appropriate remedy to unconstitutional overcrowding should be.

Id. at 290; see also Hassine v. Jeffes, 846 F.2d 169, 178 (3d Cir. 1988) (commonality established where inmates complained about cell conditions, food service and security); Inmates of Bucks County Corr. Facility v. County of Bucks, at *4 (E.D. Pa. Dec. 20, 2004) (claim that prison conditions violated the Eighth and Fourteenth Amendments

raised common questions).

III. RULE 23(A)(3)'S TYPICALITY REQUIREMENT IS SATISFIED

In considering typicality, the court must determine whether “the named plaintiffs’ individual circumstances are markedly different or ... the legal theory upon which the claims are based differs from that upon which the claims of other class members will perforce be based.” Johnston, 265 F.3d at 184. However, typicality does not require that all class members share identical claims. So long as “the claims of the named plaintiffs and putative class members involve the same conduct by the defendant, typicality is usually established regardless of factual differences.” Newton v. Merrill Lynch, Pierce, Fenner & Smith, Inc., 259 F.3d 154, 183-84 (3d Cir. 2001).

In this case, the claims of the named Plaintiffs and all class members arise out of the same unconstitutional conditions of confinement at PCJ. The Plaintiffs assert the same theories of liability, and seek the same relief, on behalf of the class. Thus the typicality requirement of Rule 23 (a)(3) is satisfied.

III. RULE 23(A)(4)'S ADEQUACY REQUIREMENT IS SATISFIED

Class representatives must “fairly and adequately protect the interests of the class.” Fed. R. Civ. P. 23(a)(4). In analyzing this element, the court must determine whether the representatives’ interests conflict with those of the class and whether the class attorney is capable of representing the class. Amchem, 521 U.S. at 625-26; Newton, 259 F.3d at 185.

There are no conflicts between the Plaintiffs and other class members. No class member has an interest in maintaining the current conditions at the prison. Dittimus-Bey,

244 F.R.D. at 292. “[I]t does not matter for purposes of Rule 23(a)(4) that the named plaintiffs allegedly suffered different manifestations of the prison’s unconstitutional overcrowding. Where an action challenges a policy or practice, the named plaintiffs suffering one specific injury from the practice can represent a class suffering other injuries, so long as all the injuries are shown to result from the practice.” Id. (quoting Baby Neal v. Casey, 43 F.3d 48, 58 (3d Cir. 1994)).

Adequacy of class counsel cannot reasonably be questioned. Plaintiffs are represented by counsel experienced in this type of litigation:

- The Center for Social Justice (“CSJ”) at Seton Hall Law School is an organization that was founded in the public interest. CSJ has extensive experience litigating class actions in a wide range of public interest and constitutional matters. Representative class actions handled by CSJ include Alves v. Ferguson, Civ. No. 01-789 (D.N.J. ongoing) (a putative class action challenging unconstitutional conditions of confinement and inadequate mental health treatment afforded civilly committed sex offenders) and M.A. v. Newark Public Schools, CV No. 01-3389 (D.N.J. 2003) (a class action challenging inadequate special education programs).
- The American Civil Liberties Union of New Jersey (“ACLU-NJ”), also has extensive experience litigating class actions in a wide range of public interest and constitutional matters. Representative class actions handled by the ACLU-NJ include Jones v. Hayman (an ongoing action challenging discriminatory conditions of confinement afforded female prisoners) and Sojourner A. v. NJ Dep’t. of Human Svcs., 828 A.2d 308 (N.J. 2003) (an action challenging New Jersey’s welfare cap).
- Dechert LLP also has experience litigating class actions in public interest and constitutional matters. Representative class actions handled by Dechert as pro bono counsel include Williams v. Morton, 343 F.3d 212 (3d Cir. 2003) (a putative class action challenging the diet provided to Muslim inmates in New Jersey State Prison) and Maldonado v. Houstoun, 256 F.3d 181 (3d Cir. 2001) (a class action challenging constitutionality of Pennsylvania’s welfare benefits regulations). Dechert has also served as counsel in literally hundreds of private class actions.

The Plaintiffs' counsel have the interest, ability and resources to represent the class. Thus both aspects of Rule 23 (a)(4) are satisfied.

V. CERTIFICATION IS APPROPRIATE UNDER RULE 23(B)(2)

Rule 23(b)(2) permits class actions for declaratory or injunctive relief where “the party opposing the class has acted or refused to act on grounds generally applicable to the class.” Civil rights cases are “prime examples” of cases appropriate for certification under Rule 23(b)(2). Amchem, 521 U.S. at 614; see also Baby Neal, 43 F.3d at 58–59 (“[i]t is the [Rule 23] (b)(2) class which serves most frequently as the vehicle for civil rights actions and other institutional reform cases that receive class action treatment”); Dittimus-Bey, 244 F.R.D. at 292 (Rule 23(b)(2) is “liberally applied in the area of civil rights, including suits challenging conditions and practices at various detention facilities”).

Only last year, in Dittimus-Bey, the court certified a Rule 23(b)(2) class with respect to overcrowding at the Camden County Jail. As the court explained,

This case is a paradigm of the type of class suitable for certification under Rule 23(b)(2). Plaintiffs make no allegation that they are being singled out; rather, they claim that the policies of the Correctional Facility that they seek to enjoin cause injury to all present and future inmates. Indeed, it would be impossible to provide injunctive relief except on a class-wide basis.

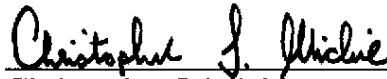
244 F.R.D. at 293. This case is no different.

CONCLUSION

For the foregoing reasons, Plaintiffs respectfully request that the Court issue an order: (1) finding that the requirements of Federal Rules of Civil Procedure 23(a) and

23(b)(2) have been satisfied as to the claims asserted in the Plaintiffs' Complaint; (2) certifying the following class: "all persons who are now or will become incarcerated at PCJ during the pendency of this lawsuit" and (3) appointing the Plaintiffs and their counsel to represent the Class.

Respectfully submitted,



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