Case No. 19-6668

RESPONDENT'S SUPPLEMENTAL APPENDIX

INDEX

ANDREW J.J. WOLF, R. HANS KRUGER, and DAVID S. BEGLEY, Plaintiffs, v. C.L. "BUTCH" OTTER; LAWRENCE WASDEN; IDAHO STATE BOARD OF CORRECTIONS; ROBIN SANDY, J.R. VAN TASSEL; JAY NEILSON; IDAHO COMMISSION OF PARDONS AND PAROLE; OLIVIA CRAVEN; BILL YOUNG; MARK FUNAIOLE; JANE DRESSEN; NORMAN LANGERAK; MIKE MATTHEWS; BRENT REINKE; CORRECTIONS CORPORATION OF AMERICA, INC.; TIM WENGLER; CORRISON INC., each sued in their individual and official capacities and their successors in office, Defendants.	Case No. 1:12-cv-00526-BLW JUDGMENT

In accordance with Federal Rule of Civil Procedure 58 and the order entered concurrently, IT IS ORDERED, ADJUDGED, AND DECREED that judgment be entered in favor of the sole remaining defendant, Henry Atencio (substituted for former director defendants Brent Reinke and Kevin Kempf), on all claims alleged against such defendant.

DATED: March 21, 2017

B. Lynn Winmill
Chief Judge
United States District Court

UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF IDAHO

ANDREW J.J. WOLF, R. HANS KRUGER, and DAVID S. BEGLEY, Plaintiffs, v. C.L. "BUTCH" OTTER; LAWRENCE WASDEN; IDAHO STATE BOARD OF CORRECTIONS; ROBIN SANDY, J.R. VAN TASSEL; JAY NEILSON; IDAHO COMMISSION OF PARDONS AND PAROLE; OLIVIA CRAVEN; BILL YOUNG; MARK FUNAIOLE; JANE DRESSEN; NORMAN LANGERAK; MIKE MATTHEWS; BRENT REINKE; CORRECTIONS CORPORATION OF AMERICA, INC.; TIM WENGLER; CORRISON INC., each sued in their individual and official capacities and their successors in office, Defendants.	Case No. 1:12-cv-00526-BLW MEMORANDUM DECISION AND ORDER

I
INTRODUCTION

Before the Court is Defendant Kevin Kempf's second motion for summary judgment (Dkt. 179), as well as a host of motions filed by Plaintiffs Andrew Wolf and Hans Kruger, including two motions to reconsider, a motion for leave to conduct additional discovery, and various other motions. *See* Dkts. 170, 173, 176, 193-96. For the reasons explained below, the Court will deny plaintiffs' motions to reconsider, deny

plaintiffs' motion to conduct additional discovery, and refrain from ruling on the pending motion for summary judgment until plaintiffs have filed a substantive response.

II
BACKGROUND

Plaintiffs are prisoners in the custody of the Idaho Department of Correction. They are proceeding pro se in this action, which has been narrowed to two plaintiffs pursuing one defendant on three claims. In the original complaint, three plaintiffs alleged twenty-four claims against sixteen defendants. *See Compl.*, Dkt. 7. The Court has repeatedly denied plaintiffs' efforts to certify this as a class action.

Two of plaintiffs' remaining claims deal with conditions of confinement at the Idaho State Correctional Center (ISCC) in Kuna, Idaho, and the third is a failure-to-protect claim. The details of these claims are as follows:

Twelfth Claim. In the twelfth claim for relief, Plaintiff Andrew Wolf alleges that defendant failed to provide adequate dayroom space in the West Wing Living Units of ISCC. *See Compl.*, Dkt. 7, ¶ 338.

Twentieth Claim: Out-of-Cell Time at ISCC. In the twentieth claim, Wolf alleges that prison officials fail to adequately staff ISCC, which resulted in Wolf's failure to receive enough time outside his prison cell. *See Compl.*, Dkt. 1, ¶ 349.[1]

[1] This claim originally targeted two prisons: ISCC and Idaho State Correctional Institution (ISCI), also in Kuna. In a previous ruling, however, the Court granted defendant's motion for summary judgment on issues related to the ISCI claims within the twentieth claim. So at this point, Wolf is pursuing the inadequate staffing/out-of-cell-time claim only as it relates to ISCC.

Twenty-Fourth Claim: *Failure to Protect.* In the twenty-fourth claim, Plaintiff Hans Kruger alleges that the prison failed to protect him from attacks by other inmates.

In March 2016, this Court granted summary judgment in defendant's favor on numerous other claims. *See Mar. 31, 2016 Order*, Dkt. 160. This order left plaintiffs with the three claims just discussed. The Court did not schedule a trial on these claims, however, opting instead to allow for further summary judgment proceedings in accordance with Federal Rule of Procedure 56(e).

Regarding the twenty-fourth claim, the Court decided that Plaintiff Kruger was entitled to review certain documents related to prisoner-on-prisoner assaults, which defendant had previously refused to produce. *See id.*, at 7. The Court ordered defendant to produce these documents to Kruger and, after doing so, allowed defendant to renew his motion for summary judgment on the twenty-fourth claim. Kruger would then have an opportunity to file a new response brief, potentially supported with new factual evidence gleaned from the additional discovery materials provided to him. *See id.*, at 35.

Regarding the twelfth and twentieth claims, Kempf's sole argument on summary judgment was that these claims were moot. The Court disagreed, but allowed Kempf the opportunity renew his motion to address those claims on the merits. *See Mar. 31, 2016 Order*, Dkt. 160, at 18, 19.

After the Court issued this ruling, plaintiffs filed two motions to reconsider, plus a motion for leave to conduct additional discovery. *See* Dkts. 170, 173, 176. Later, defendant filed a second motion for summary judgment regarding the three remaining claims. *See* Dkt. 179. The Court will address each of these motions in turn (as well as

various additional motions), beginning with plaintiffs' request that this Court reconsider its March 31, 2016 Order.

III
DISCUSSION

A. Motion to Reconsider Summary Judgment in Defendant's Favor (Dkt. 173)

1. Governing Legal Standard

Plaintiffs rely on Federal Rule of Civil Procedure 60(b) to support their motions to reconsider. *See* Dkts. 170, 173. That rule does not apply here because this Court has not entered a final judgment. *See Madsen v. Bumb*, 419 F.2d 4, 6 (9th Cir. 1969) ("By its terms Rule 60(b) applies only to relief from a final judgment."). Nevertheless, "as long as a district court has jurisdiction over the case, then it possesses the inherent procedural power to reconsider, rescind, or modify an interlocutory order for cause seen by it to be sufficient." *City of L.A. Harbor Div. v. Santa Monica Baykeeper*, 254 F.3d 882, 889 (9th Cir. 2001).

"A motion for reconsideration should not be granted, absent highly unusual circumstances, unless the district court is presented with newly discovered evidence, committed clear error, or if there is an intervening change in the controlling law." *Sissoko v. Rocha*, 440 F.3d 1145, 1153-54 (9th Cir. 2006). The Court will apply this standard to both motions to reconsider (Dkts. 170, 173).

2. Newly Discovered Evidence

Plaintiffs ask this Court to reconsider its March 2016 summary judgment ruling based on their assertion that they have recently discovered new evidence. The evidence

consists of two multi-page charts, which the parties refer to as staffing matrixes, or staffing rosters. The charts list which prison employee is slated to cover a particular post at the prison for the year 2016. An excerpt of the ISCI chart is shown here:

Idaho State Correctional Institution
Master Roster—2016

Lieutenants										
Staff[2]	**Post**	**Position**	**Sun**	**Mon**	**Tue**	**Wed**	**Thu**	**Fri**	**Sat**	**Supervisor**
	1L	Shift Commander, 1st Shift						X	X	Sammons, David
	2L	Shift Commander, 2nd Shift	X	X						Sammons, David
	3L	Shift Commander, 3rd Shift								Sammons, David
	4L	Housing Lieutenant	X						X	Sammons, David
	5L	Fixed Relief	3rd	3rd	X	X	Rlf	1st	1st	Sammons, David
	6L	External Security/Fixed Relief	2nd	2nd	ES	ES	ES	1st	1st	Sammons, David
	7L	Relief								Sammons, David

Maxson Dec., attachment thereto, entitled ISCI Master Roster – 2016, Dkt. 173-4, at 1.

Standing alone, the charts are not helpful to plaintiffs' case. Although plaintiffs say the charts are generally relevant to their assertion that the prisons are understaffed, the charts do not contain enough information to establish that either prison is understaffed, or, more to the point, that Wolf does not receive sufficient time outside his cell due to alleged understaffing. Likewise, even viewing these charts in the context of other evidence presented in connection defendant's summary judgment motion, the charts

[2] All entries in this column were redacted.

do not lead to either inference. Similarly, the charts do not shore up plaintiffs' defenses on any other claim that was summarily adjudicated in the Court's March 31, 2016 Order. The Court will therefore deny plaintiffs' motion for reconsideration based on this evidence. After all, even assuming this evidence is newly discovered, plaintiffs would still need to demonstrate that it is of such a magnitude that if the Court had known of it earlier, the outcome would likely have been different. *Cf. Feature Realty, Inc. v. City of Spokane*, 331 F.3d 1082, 1093(9th Cir. 2003) (in seeking relief from judgment, the moving party must, among other things, demonstrate that the new evidence is "'of such magnitude that production of it earlier would have been likely to change the disposition of the case.'") (citation omitted). Plaintiffs cannot clear this hurdle.

Perhaps recognizing that the new evidence is not particularly helpful to their case, plaintiffs do not argue that the charts themselves – either standing alone or viewed in the context of other evidence – would have made any difference. Instead, they argue that if they had had these charts earlier in the litigation, they would have been prompted to undertake other discovery that would have allowed them to dispute defendant's evidence establishing that inmates receive sufficient out-of-cell time. *See* Dkt. 173, at 6 (citing Dkt. 137-7, at 8, ¶ 26). Ultimately, then, plaintiffs are not asking the Court to reconsider its earlier ruling on the basis of newly discovered evidence. They are asking the Court to modify the scheduling order by reopening the discovery period. As plaintiffs recognize in a separately filed motion to reopen discovery, *see* Dkt. 176, such a request is governed by Federal Rule of Civil Procedure 16. The Court will therefore address the remainder of the arguments advanced in the motion for reconsideration in the context of ruling on

plaintiffs' motion to reopen discovery. *See discussion infra*, ¶ III.C.

B. Motion to Reconsider Discovery Order (Dkt. 173)

Before resolving the motion to reopen discovery, the Court will resolve plaintiffs' motion to reconsider a discovery ruling. Plaintiffs contend that this Court mistakenly "failed to address all of the Motion to Compel Discovery documents" when it resolved an earlier motion to compel. *See Motion*, Dkt. 173, at 9.

The Court is not persuaded. The motion to compel at issue related to 417 separate document requests plaintiffs had propounded. *See* Dkt. 107. Generally speaking, many of the documents plaintiffs sought do not appear proportional to needs of this case. *See generally* Fed. R. Civ. P. 26(b)(1) ("Parties may obtain discovery regarding any nonprivileged matter that is relevant to any party's claim or defense *and proportional to the needs of the case*, considering . . . [various factors]."") (emphasis added). For example, although plaintiffs' central complaint is that the prisons are overcrowded, they asked Kempf to produce documents related to the prison's standard operating procedures (SOPs) for hundreds of different topics that do not appear to have any bearing on the issue of overcrowding. The requested SOPs include those related to, among other things: (1) cash receipts; (2) encumbrances; (3) fiscal policy; (4) grant management; (5) offender trust accounts; (6) purchasing and contracting; (7) quality management systems; (8) internship opportunities and management; (9) hygiene of officers; (10) offender barbers; (11) facility housekeeping (12) radio/TV/movie programs in institution; (13) religious activities; (14) special needs treatment plans; and (15) use of telephones by offenders. *See Plaintiffs' First Req. for Prod. of Docs.*, Dkt. 107-1 (Request Nos. 60, 72, 74, 78, 79,

87, 126, 127, 152, 174, 177, 178, 179, 184, 213).

In their motion to compel, plaintiffs continued the same shotgun approach. In a single, relatively brief motion, they asked the Court to compel defendant to produce documents responsive to their 417 requests, some of which requested documents dating back to 2005. *See generally* Dkt. 107, at 9. Despite seeking such a sweeping order, plaintiffs' motion largely failed to direct the Court's attention to any particular document request, or even to specific categories of documents. Instead, plaintiffs typically made generalized arguments such as this one: "Plaintiffs would seek this Court to compel defense counsel to produce discovery documents requested that go back to January 1, 2005, based upon the Balla Final Expert Master Report of Chase Riveland concerning the 12, 13th, 20th, 21st Claims for Relief on Inadequate Staffing and Lack of Out-of-Cell Time at ISCC and ISCI." *Motion to Compel*, Dkt. 107, at 6.[3]

The Court observed that such general arguments were not persuasive, particularly when plaintiffs sought so many categories of documents spanning such a wide range of topics and such a lengthy period. The Court therefore denied plaintiffs' request for a blanket order compelling defendant to provide documents responsive to all 417 requests. In an effort to move the litigation along, however, the Court provided specific guidance on two requests (Nos. 27 and 28), which were the only requests plaintiffs specifically and

[3] Plaintiffs discussed some requests more specifically in an affidavit filed with their reply brief. *See Wolf Aff.*, Dkt. 110-1. This affidavit, however, is filled with conclusory statements that did not (and do not) persuade the Court to issue a broader order. Further, by waiting until reply, plaintiffs did not give defendant an opportunity to respond to these arguments.

meaningfully discussed in their motion. *See* Dkt. 107, at 6-7 (discussing document requests 27 and 28).

The Court has reviewed its ruling, as well as the underlying motion papers, and it is not persuaded to vacate or modify its order. Plaintiffs chose to make general arguments, loosely based on hundreds of document requests, which, in turn, often suffered from a lack of focus. The Court did the best it could with such a motion – by specifically dealing with the requests that were actually raised in the motion, and otherwise issuing a blanket denial of plaintiff's sweeping motion to compel. The Court will therefore deny Plaintiff's motion to the extent plaintiffs are asking the Court to compel any further responses from defendant as to these 417 requests.

C. Motion to Reopen Discovery (Dkt. 176)

The next issue is whether the Court should modify the scheduling order by reopening the discovery period. Rule 16(b)(4) provides that a scheduling order "may be modified only for good cause and with the judge's consent." Fed. R. Civ. P. 16(b)(4). "The district court is given broad discretion in supervising the pretrial phase of litigation, and its decisions regarding the preclusive effect of a pretrial order . . . will not be disturbed unless they evidence a clear abuse of discretion." *Johnson v. Mammoth Recreations, Inc.*, 975 F.2d 604, 607 (9th Cir.1992) (citation and internal quotation marks omitted). The pretrial schedule may be modified "if it cannot reasonably be met despite the diligence of the party seeking the extension." *Id*. at 609. If the party seeking the modification "was not diligent, the inquiry should end" and the motion to modify should not be granted. *Id.* While prejudice to the party opposing the modification may provide

additional reasons for denying the motion, it is not required to deny a motion to amend under Rule 16(b). *Coleman v. Quaker Oats Co.*, 232 F.3d 1271, 1295 (9th Cir.2000).

Plaintiffs advance several arguments to justify their motion to reopen discovery, but none establish the requisite good cause.

1. Defendant's Alleged "Fraud" Relating to Document Request No. 360

Plaintiffs' central argument is that defendant committed "fraud" during the discovery period. In a nutshell, plaintiffs correctly point out that during informal discovery meetings, Kempf said he would produce the prison staffing charts discussed above, but then later said he would not produce those very documents. The relevant request is No. 360, which is shown here, along with its corresponding response:

> **REQUEST NO. 360:** Produce the staffing matrix for ISCI from January 1, 2005 to present, which sets forth the following: 1) all three shifts; 2) the posting for each officer; 3) posting for each non-security personnel; [and] 4) calendar days that each is scheduled.
>
> **RESPONSE TO REQUEST NO. 360:** Defendant objects to this request on the grounds that it seeks information that is outside the timeframe alleged in plaintiffs' complaint, and therefore, is not relevant nor likely to lead to the discovery of admissible relevant evidence. Defendant further objects on the grounds that this request is overly broad and unduly burdensome.

Dkt. 173-3, at 21 (page 86 of the written response). In earlier correspondence, Defendant Kempf's counsel said she would produce the documents so long as plaintiffs limited their request to the period 2011 to present. *See Oct. 10, 2014 Letter from Leslie Hayes to Plaintiffs*, Dkt. 107-3; *Feb. 13, 2015 Letter from Leslie Hayes to Plaintiffs*, Dkt. 107-4, at 3. Kempf now says that regardless of what happened during informal negotiations, his formal, written response controls.

The Court does not condone this behavior by defense counsel, but it cannot conclude that defendant defrauded plaintiffs or the Court. The parties were negotiating 417 wide-ranging document requests and defense counsel's initial letter to plaintiffs discussing the document requests indicated that defendant reserved the right to later object to the requests, regardless of what was said in the letter. *See Oct. 10, 2014 Letter*, Dkt. 107-3, at 1 ("Please note that I reserve the right to . . . assert additional objections [or] withhold documents . . . and that any statements provided herein that I will provide you with certain documents does not constitute a waiver of . . . other general objections to the productions of those documents.").

Further, by April 2015 – when defendant served his formal, written responses – plaintiffs were on notice that defendant did not intend to produce the requested staffing matrix, notwithstanding earlier, contrary representations. At that point, plaintiffs could have brought this issue to the Court's attention with a targeted motion to compel. They did not do so. Granted, they filed the sweeping motion to compel discussed above, but this motion largely failed to discuss specific document requests. More to the point, this motion did not place any special attention on Document Request No. 360. In fact, plaintiffs filed this motion before Kempf had even served his formal written responses. The formal, written response was served during the briefing period for that motion to compel, yet despite filing numerous other documents (including a "supplemental reply" related to that very motion, *see May 27, 2015 Supp. Reply*, Dkt. 114), plaintiffs did not specifically point out that defendant had reneged on an informal agreement regarding Request No. 360. The upshot is that defendant's alleged "fraud" regarding Request No.

360 was not brought to the Court's attention until nearly one year later. In the meantime, plaintiffs effectively dropped the issue.

On these facts, the Court cannot conclude that plaintiffs were diligent in their efforts to compel Kempf to produce the staffing rosters. Accordingly, the Court cannot find that they established good cause to conduct additional discovery based on any information they might have learned by viewing the rosters. For all these reasons, the Court will deny plaintiffs' motion to reopen the discovery period based on Kempf's alleged fraud regarding Document Request No. 360.

2. Defendant's Alleged Fraud Related to Other Document Requests

Likewise, the Court does not find good cause to reopen the discovery period based on plaintiffs' complaints about other document requests. In that regard, plaintiffs generally say Kempf's alleged "fraud" is not restricted to Document Request No. 360. They say Kempf failed to produce responsive documents to hundreds of other requests. *See* Dkt. 173, at 5, 8. But once again, plaintiffs do not discuss the other requests in any meaningful way. Instead, they attach a cryptic, two-page chart to their motion papers, which is meant to flesh out the details regarding the alleged misconduct. *See Ex. 78 to Plaintiffs' Motion,* Dkt. 173-5. A representative portion of the chart is shown here:

Discovery Disclosures Agreed To	
Request or Production Nos.:	**Actually Produced:**
RFP Nos. 45-260. Per Docket 160 RFP Nos. 60 and 70 became relevant.	RFP Nos. 69-70, 95-96, 108, 110, 119, 128 and 208.

Chart entitled "Discovery Disclosures Agreed To", Dkt. 173-5.

The few lines of text shown here are presumably meant to convince the Court to compel defendant to provide further response to over 200 separate document requests (Nos. 45-260). Yet there is simply not enough explanation or background provided to convince the Court that defendant misbehaved during discovery regarding these requests.

The remainder of the chart suffers from similar defects and thus fails to persuade the Court that the discovery period should be reopened due to any alleged fraud.

3. Plaintiffs' Other Arguments

The Court has considered all of plaintiffs' remaining arguments in support of their request to reopen discovery and finds them unpersuasive. Among other things:

Wolf suggests he should be allowed to conduct additional discovery because his claim related to out-of-cell time was not dismissed on summary judgment. *See Motion*, Dkt. 176, at 3. But the mere fact that a claim survived a motion for summary judgment does not justify reopening discovery.

Wolf also argues that because Kempf and his staff assumed control of ICC in July 2014, plaintiffs should be able to conduct discovery about staffing and building schedules after the 2014 change in management. *Id*. at 4. But the discovery period remained open until after July 2014, meaning that plaintiffs have already had the opportunity to conduct discovery regarding ICC (renamed ISCC) after the change in management occurred. In fact, plaintiffs' document request, discussed above, was propounded in September 2014.

Plaintiffs next say they should be permitted to conduct additional discovery regarding Kruger's failure-to-protect claim. Here, the Court previously set up a phased discovery plan: In March 2016, defendant was ordered to produce documents relating to

prisoner-on-prisoner assaults at the prison during the one-year period before Kruger filed his complaint. *See* Dkt. 160, at 6-7, 34. (For ease of reference, the Court will refer to these documents as "Assault Packets"). If Kruger established that he was subjected to a serious risk of harm during that period, then the Court indicated it would consider ordering the production of additional documents. *Id.* at 7-8. In this motion, Kruger does not make such a showing, so the Court will not order additional discovery.

For all the reasons set forth above, the Court does not find good cause to modify the scheduling order. It will therefore deny plaintiffs' motion to reopen discovery.

D. Motion for a Protective Order – Documents Related to Prisoner-on-Prisoner Assaults (Dkt. 170)

Plaintiffs' next motion is framed as a motion to reconsider, but the issue is actually whether this Court should issue a protective order related to documents Kempf has produced to Kruger – and only to Kruger – during discovery. As noted above, in March 2016, this Court ordered Kempf to produce Assault Packets to Plaintiff Kruger. Defendant complied with this order by allowing Kruger to examine these documents, but he has refused to allow Kruger to share these documents with any other inmate – including Plaintiff Wolf.

Wolf says he should be allowed to view the documents because they are "relevant to Wolf's overall Eighth Amendment Claim [of] systemwide overcrowding and [he] should be permitted access to it." *Reply,* Dkt. 175, at 6. Yet Wolf no longer has a failure-to-protect claim to pursue. In its March 2016 Order, the Court dismissed Wolf's failure-to-protect claim because he failed to exhaust administrative remedies. *See Mar.*

31, 2016 Order, Dkt. 160, at 23-30. Thus, the only remaining failure-to-protect claim at issue in this action belongs to Kruger. Further, at the same time the Court dismissed Wolf's failure-to-protect claim, the Court ordered defendant to "produce *to Plaintiff Kruger* documents related to inmate-on-inmate assaults during the one-year period before the complaint was filed." *Id.* at 34 (emphasis added). Citing this language of the order, along with safety and security concerns, Kempf has refused to allow Wolf to view the Assault Packets. *See generally Cluney Aff.*, Dkt. 174-1.

Kempf should have sought a protective order clarifying that Kruger would not be allowed to share the documents with other inmates, including Wolf. Or, at a minimum, Kempf should have sought a clarifying order from this Court. Nevertheless, based on the record in this case, the Court finds good cause to issue a protective order.

Federal Rule of Civil Procedure 26(c)(1) provides that a Court may issue a protective order for good cause shown. IDOC's Deputy Chief of Prisons Shannon Cluney explains that disseminating the documents provided to Kruger to other inmates could present safety and security risks at the prison. *See Cluney Aff.*, Dkt. 174-1, ¶ 7. Specifically, it seems that the key concern is inmate safety, because inmates who examine the documents might be able to figure out which inmates are providing information to the prison. Then the reporting inmate's safety is placed at risk, and, further, inmates might be less likely to report information in the future. *Id.* Cluney also says inmates with access to the documents could potentially use the information contained in those documents to manipulate other inmates. *Id.*

Under these circumstances, the Court will issue a protective order preventing

Kruger from sharing these documents with any other inmate, including Wolf.

Finally, the Court is not persuaded by Wolf's argument that Kruger is incapable of pursuing these claims unless Wolf is allowed to view the Assault Packets. Nor is the Court persuaded that Kempf effectively waived any right to preclude Wolf from viewing these documents by allowing Wolf to attend Kruger's deposition or because Wolf has apparently already viewed some confidential documents. The Court will therefore deny Wolf's motion related to the Assault Packets and will instead issue a protective order allowing Kruger to view the documents, but preventing him from copying or disseminating the documents to others without a prior Court order.

The Court will also deny plaintiffs' alternative request to appoint counsel. The Court has previously denied this request and will do so again for the same reasons. *See June 13, 2013 Order*, Dkt. 27, at 22-24; *Mar. 16, 2016 Order*, Dkt. 158, at 7.

E. Defendant's Second Motion for Summary Judgment (Dkt. 179)

Defendants filed their second motion for summary judgment in July 2016. *See* Dkt. 179. In the ensuing several months, plaintiffs have not filed a substantive response. The Court recently ordered plaintiffs to file a substantive response by no later than March 8, 2017. The Court will therefore refrain from ruling on the pending motion for summary judgment, along with various related motions (including motions to seal or unseal documents and a request for judicial notice) until the summary judgment motion is fully briefed.

ORDER

IT IS ORDERED that:

1. Plaintiffs' Motion to Alter, Amend, Vacate or Reconsider Re: Dkt. 168 (Dkt. 170) is **DENIED.**

2. Plaintiffs' Motion to Reconsider Re: Docket 160 (Dkt. 173) is **DENIED**.

3. Plaintiff Hans Kruger shall be allowed to view the Assault Packets, but he shall not be allowed to copy the Assault Packets or disseminate their contents to any other person without a prior order from this Court.

4. Plaintiff's Motion for Leave to Conduct Further Discovery (Dkt. 176) is **DENIED.**

5. The Court will **REFRAIN FROM RULING** on Defendant's Second Motion for Summary Judgment (Dkt. 179) and the various, related motions – including motions to seal and unseal (Dkts. 178, 194, 195) and plaintiffs' request for judicial notice (Dkt. 196) – until plaintiffs have had the opportunity to submit a substantive response to the motion and defendant has had the opportunity to reply. *See Feb. 14, 2017 Order*, Dkt. 200 (ordering plaintiffs to submit any substantive response by no later than March 1, 2017, with the optional reply brief due March 8, 2017).

6. Plaintiffs' Motion for Leave to File More than Three Motions (Dkt. 191) is **DENIED.**

DATED: March 6, 2017

B. Lynn Winmill
Chief Judge
United States District Court

UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF IDAHO

ANDREW J.J. WOLF, R. HANS KRUGER, and DAVID S. BEGLEY, Plaintiffs, v. C.L. "BUTCH" OTTER; LAWRENCE WASDEN; IDAHO STATE BOARD OF CORRECTIONS; ROBIN SANDY, J.R. VAN TASSEL; JAY NEILSON; IDAHO COMMISSION OF PARDONS AND PAROLE; OLIVIA CRAVEN; BILL YOUNG; MARK FUNAIOLE; JANE DRESSEN; NORMAN LANGERAK; MIKE MATTHEWS; BRENT REINKE; CORRECTIONS CORPORATION OF AMERICA, INC.; TIM WENGLER; CORRISON INC., each sued in their individual and official capacities and their successors in office, Defendants.	Case No. 1:12-cv-00526-BLW MEMORANDUM DECISION AND ORDER RE PLAINTIFFS' MOTION FOR ENLARGEMENT OF TIME

Before the Court is Plaintiffs' Motion for an Enlargement of Time to Respond to Defendant Kempf's Second Motion for Summary Judgment (Dkt. 192). Defendant filed his second motion for summary judgment on July 29, 2016. *See* Dkt. 178. In the ensuing months, plaintiffs have not filed a substantive response to the motion. Instead, in August 2016, plaintiffs filed a motion asking for an extension of time in which to respond. *See* Dkt. 192. But plaintiffs did not ask for a date certain; instead, they asked the Court to allow them to file their response 45 days after this Court has ruled on various motions

plaintiffs had filed, including two motions to reconsider and a related motion for leave to conduct further discovery. *See* Dkt. 192, at 3. The Court will resolve these motions in a forthcoming order. In the meantime, however, if plaintiffs wish to file a substantive response to the summary-judgment motion, they shall do so by March 1, 2017.

ORDER

IT IS ORDERED that:

1. Plaintiffs' Motion for an Enlargement of Time to Respond to Defendant Kempf's Second Motion for Summary Judgment (Dkt. 192) is **GRANTED in part and DENIED in part** as follows:

2. The motion is **DENIED** to the extent plaintiffs seek an order allowing them to file a substantive response to the summary-judgment motion after this Court has ruled on plaintiffs' various pending motions in this case.

3. ***The motion is GRANTED to the extent the Court will allow plaintiffs until March 1, 2017 to file a substantive response to defendant's pending summary-judgment motion.***

4. Defendant's optional reply brief is due by **12:00 p.m. on March 8, 2017.**

DATED: February 14, 2017

B. Lynn Winmill
Chief Judge
United States District Court

UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF IDAHO

ANDREW J.J. WOLF, R. HANS KRUGER, and DAVID S. BEGLEY, Plaintiff, v. C.L. "BUTCH" OTTER; LAWRENCE WASDEN; IDAHO STATE BOARD OF CORRECTIONS; ROBIN SANDY, J.R. VAN TASSEL; JAY NIELSON; IDAHO COMMISSION OF PARDONS AND PAROLE; OLIVIA CRAVEN; BILL YOUNG; MARK FUNAIOLE; JANE DRESSEN; NORMAN LANGERAK; MIKE MATTHEWS; BRENT REINKE; CORRECTIONS CORPORATION OF AMERICA, INC.; TIM WENGLER; CORIZON INC., each sued in their individual and official capacities and their successors in office, Defendants.	Case No. 1:12-cv-00526-BLW **INITIAL REVIEW ORDER**

The Clerk of Court conditionally filed the three Plaintiffs' Complaint as a result of their status as prisoners and their in forma pauperis requests. The Court now reviews the Complaint to determine whether it or any of the claims contained therein should be summarily dismissed under 28 U.S.C. §§ 1915 and 1915A. Having reviewed the record, and otherwise being fully informed, the Court enters the following Order.

REVIEW OF COMPLAINT

1. Introduction

Plaintiffs are three prisoners in the custody of the Idaho Department of Correction (IDOC). Plaintiff Wolf is currently incarcerated at Idaho Correctional Center (ICC), and Plaintiffs Kruger and Begley are currently incarcerated at Idaho State Correctional Institution (ISCI).

In this action, Plaintiffs sue the following Defendants for violations of Plaintiffs' constitutional rights:

1. C.L. "Butch" Otter, Governor of Idaho.
2. Lawrence Wasden, Idaho Attorney General.
3. Robin Sandy, J.R. Van Tassel, and Jay Nielson, all of whom are members of the Idaho State Board of Correction.
4. Olivia Craven, Mark Funaiole, Jane Dressed, Norman Langerak, and Mike Matthews, all of whom are members of the Idaho Commission of Pardons and Parole.
5. Brent Reinke, Director of the Idaho Department of Correction.
6. Corrections Corporation of America, Inc. (CCA), a private entity operating ICC under contract with the IDOC.
7. Tim Wengler, Warden of ICC.
8. Corizon, Inc., the IDOC's prison medical care provider.

The crux of Plaintiffs' Complaint is the allegation that Idaho prisons are overcrowded. Plaintiffs compare their action to *Balla v. Idaho State Board of Correction*, Case No. 1:81-cv-01165-BLW (D. Idaho), a case resulting in an injunction placing population caps on several housing units at ISCI. Plaintiffs claim that, because prisoners officials have had to comply with the *Balla* injunction, they have been housing too many inmates in other housing units and other prisons not subject to the injunction. Plaintiffs

assert a number of constitutional claims.

2. Standard of Law for Summary Dismissal

The Court is required to review complaints filed in forma pauperis, or those filed by prisoners seeking relief against a governmental entity or an officer or employee of a governmental entity, to determine whether summary dismissal is appropriate. The Court must dismiss a complaint or any portion thereof that states a frivolous or malicious claim, that fails to state a claim upon which relief may be granted, or that seeks monetary relief from a defendant who is immune from such relief. 28 U.S.C. §§ 1915(e)(2)(B), 1915A(b).

A complaint fails to state a claim for relief under Rule 8 of the Federal Rules of Civil Procedure if the factual assertions in the complaint, taken as true, are insufficient for the reviewing court plausibly "to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009). "Threadbare recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice." *Id.* In other words, although Rule 8 "does not require detailed factual allegations, . . . it demands more than an unadorned, the-defendant-unlawfully-harmed-me accusation." *Id.* (internal quotation marks omitted). If the facts pleaded are "merely consistent with a defendant's liability," the complaint has not stated a claim for relief that is plausible on its face. *Id.* (internal quotation marks omitted).

Plaintiffs bring their claims under 42 U.S.C. § 1983, the civil rights statute. To state a valid claim under § 1983, a plaintiff must allege a violation of rights protected by the Constitution or created by federal statute proximately caused by the conduct of a

person acting under color of state law. *Crumpton v. Gates*, 947 F.2d 1418, 1420 (9th Cir. 1991).

A prison official is not liable for damages in his or her individual capacity under § 1983 unless he or she personally participated in the alleged constitutional violations. *Taylor v. List*, 880 F.2d 1040, 1045 (9th Cir. 1989); *see also Iqbal*, 556 U.S. at 677 ("[E]ach Government official, his or her title notwithstanding, is only liable for his or her own misconduct."). "A defendant may be held liable as a supervisor under § 1983 'if there exists either (1) his or her personal involvement in the constitutional deprivation, or (2) a sufficient causal connection between the supervisor's wrongful conduct and the constitutional violation.'" *Starr v. Baca*, 652 F.3d 1202, 1207 (9th Cir. 2011) (quoting *Hansen v. Black*, 885 F.2d 642, 646 (9th Cir. 1989)). This sufficient causal connection can be established by setting in motion a series of acts by others, or by knowingly refusing to terminate a series of acts by others, which the supervisor knew or reasonably should have known would cause others to inflict a constitutional injury." *Id.* at 1207-08 (internal quotation marks, citation, and alterations omitted).

The Eleventh Amendment prohibits a federal court from entertaining a suit brought by a citizen against a state. *Hans v. Louisiana*, 134 U.S. 1, 16-18 (1890). The Supreme Court has consistently applied the Eleventh Amendment's jurisdictional bar to states and state entities "regardless of the nature of the relief sought." *See Pennhurst State Sch. & Hosp. v. Halderman*, 465 U.S. 89, 100 (1984). Moreover, only a "person" may be sued pursuant to 42 U.S.C. § 1983, and a state is not considered a "person" under that

statute. *Will v. Mich. Dep't of State Police*, 491 U.S. 58, 71 (1989). Suits against state actors acting in their official capacities are actually suits against the state and are therefore also barred. Where, as here, plaintiffs seek damages against state officials, the Court construes the claims as individual capacity claims because an official capacity suit for damages would be barred. *See Cerrato v. San Francisco Cmty. College Dist*., 26 F.3d 968, 973 n.16 (9th Cir. 1994).

The Eleventh Amendment does not bar suits for prospective injunctive relief filed against state officials. *Ex Parte Young*, 209 U.S. 123, 157-58 (1908). A plaintiff may name as defendants officials who have direct responsibility in the area in which the plaintiff seeks relief. *See Rounds v. Or. State Bd. of Higher Educ.*, 166 F.3d 1032, 1036 (9th Cir. 1999). A plaintiff may not, however, obtain a "judgment[] against state officers declaring that they violated federal law in the past." *Puerto Rico Aqueduct & Sewer Auth. v. Metcalf & Eddy, Inc*., 506 U.S. 139, 146 (1993).

In order to succeed on their claims against CCA and Corizon as an entities, Plaintiffs must meet the test articulated in *Monell v. Department of Social Services*, 436 U.S. 658, 690-94 (1978); *see Tsao v. Desert Palace, Inc.*, 698 F.3d 1128, 1139 (9th Cir. 2012) (applying *Monell* to private entities). Under *Monell*, the requisite elements of a § 1983 claim against a municipality or private entity performing a state function are the following: (1) the plaintiff was deprived of a constitutional right; (2) the municipality or entity had a policy or custom; (3) the policy or custom amounted to deliberate indifference to plaintiff's constitutional right; and (4) the policy or custom was the

moving force behind the constitutional violation. *Mabe v. San Bernardino Cnty.*, 237 F.3d 1101, 1110-11 (9th Cir. 2001). An unwritten policy or custom must be so "persistent and widespread" that it constitutes a "permanent and well settled" practice. *Monell*, 436 U.S. at 691 (quoting *Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 167-168 (1970)). "Liability for improper custom may not be predicated on isolated or sporadic incidents; it must be founded upon practices of sufficient duration, frequency and consistency that the conduct has become a traditional method of carrying out policy." *Trevino v. Gates*, 99 F.3d 911, 918 (9th Cir. 1996).

3. Eighth Amendment Claims

To state a claim under the Eighth Amendment, a plaintiff must show that he is "incarcerated under conditions posing a substantial risk of serious harm," or that he has been deprived of "the minimal civilized measure of life's necessities" as a result of the defendants' actions. *Farmer v. Brennan*, 511 U.S. 825, 834 (1994) (internal quotation marks omitted). A plaintiff must also show that the defendants were deliberately indifferent to his needs. To exhibit deliberate indifference, a prison official "must both be aware of facts from which the inference could be drawn that a substantial risk of serious harm exists, and he must also draw the inference." *Id.* at 837.

A. First, Second, Seventh, Eighth, Ninth, Tenth, Eleventh, Twenty-Second, and Twenty-Third Claims for Relief: Overcrowding at Various Prison Units

- **ISCI Units 7, 9, 10, 11, 13, 14, 24, and Medical Annex**
- **ICC West Wing Living Space**
- **Idaho Maximum Security Institution Units E and G**
- **South Idaho Correctional Institution Main and North Dorms**

Plaintiffs allege that Idaho prisons are overcrowded. The fact that a prison is overcrowded "has no constitutional significance standing alone." *Balla v. Idaho State Bd. of Corr.*, 869 F.2d 461, 471 (9th Cir. 1989) (internal citations omitted). Rather, "[o]nly when overcrowding is combined with other factors such as violence or inadequate staffing does overcrowding rise to an [E]ighth [A]mendment violation." *Id*. (citing *Hoptowit v. Ray*, 682 F.2d 1237, 1246-49 (9th Cir. 1982), *abrogated on other grounds by Sandin v. Conner*, 515 U.S. 472 (1995)). More particularly, as the *Hoptowit* court explained:

> In analyzing claims of Eighth Amendment violations, the courts must look at discrete areas of basic human needs. An institution's obligation under the [E]ighth [A]mendment is at an end if it furnishes sentenced prisoners with *adequate food, clothing, shelter, sanitation, medical care, and personal safety*.
>
> In assessing claims of Eighth Amendment violations, and equally importantly, in tailoring a proper remedy, we must analyze each claimed violation in light of these requirements. Courts may not find Eighth Amendment violations based on the totality of conditions at a prison. There is no Eighth Amendment violation if each of these basic needs is separately met. *If a challenged condition does not deprive inmates of one of the basic Eighth Amendment requirements, it is immune from Eighth Amendment attack.* A number of conditions, each of which satisfy Eighth Amendment requirements, cannot in combination amount to an Eighth Amendment violation.

682 F.2d at 1246-47 (emphasis added) (internal citations, quotation marks and alterations omitted); *see also Rhodes v. Chapman*, 452 U.S. 337, 347-48 (1981) (holding that double-celling inmates is not a per se constitutional violation). As a result, Plaintiffs may not

proceed on their general claims of overcrowding, but they may proceed on some of the alleged Eighth Amendment violations that they believe exist *because of* overcrowding, as set forth below.

B. Third, Fourth, Fourteenth, and Fifteenth Claims for Relief: Inadequate Ventilation
- **ISCI Unit 14**
- **ICC West Wing Living Units**

Plaintiffs allege that the ventilation system in Unit 14 of ISCI is inadequate and causes "a build up of stale and foul air and condensation [that] increas[es] the risk of airborne diseases." (Complt. ¶56.) Plaintiffs claim that the West Wing Living Units of ICC is also inadequately ventilated and that the lack of proper air flow caused an outbreak of chicken pox and an infestation of bugs. (*Id.* ¶92.) They assert these claims against Defendants Otter, Wasden, Sandy, Van Tassel, Nielson, and Reinke.

"The lack of adequate ventilation and air flow undermines the health of inmates and the sanitation of the penitentiary." *Hoptowit v. Spellman*, 753 F.2d 779, 784 (9th Cir. 1985). Plaintiffs may seek injunctive relief on their ventilation claims against Defendant Reinke, because he appears to have responsibility for prison ventilation. *See Rounds*, 166 F.3d at 1036. However, Plaintiffs may not proceed on their damages claims regarding inadequate ventilation because they do not sufficiently allege that any particular Defendant was personally involved in the denial of adequate ventilation or that they knew the ventilation system was not functioning properly yet did nothing to remedy the situation.

C. Fifth and Sixth Claims for Relief: Inadequate HVAC at ISCI Units 7, 9, 10, 11, and 13

Plaintiffs claim that in October and November 2011, several housing units in ISCI did not have heat. Like their inadequate ventilation claims, Plaintiffs bring these claims against Defendants Otter, Wasden, Sandy, Van Tassel, Nielson, and Reinke. Subjecting inmates to extreme cold can violate the Eighth Amendment. *Johnson v. Lewis*, 217 F.3d 726, 732-33 (9th Cir. 2000). Again, Plaintiffs may proceed against Defendant Reinke for injunctive relief, but may not proceed on their damages claims regarding inadequate HVAC service. The allegations in the Complaint do not raise a reasonable inference that Defendants were personally involved in the denial of heat or that they knew the inmates were suffering from extremely cold temperatures yet deliberately failed to act.

D. Twelfth, Thirteenth, Twentieth, and Twenty-First Claims for Relief: Inadequate Dayroom Space at ICC West Wing Living Units; and Inadequate Staffing and Lack of Out-of-Cell Time at ICC and ISCI

Plaintiffs assert that Defendants Otter, Wasden, Sandy, Van Tassel, Nielson, Reinke, Wengler, and CCA are violating the Eighth Amendment by not providing adequate dayroom space or adequate time out of their cells. (Compl. ¶¶338-339, 349-50.) According to Plaintiffs, Defendants have cut available space in the dayroom to six square feet and "drastically reduced" out-of-cell time, hindering the inmates' ability to recreate and exercise. (*Id.* ¶¶89, 209.) Exercise is "a basic human need," and substantially depriving prisoners of that need can violate the Eighth Amendment. *Allen v. Sakai*, 48 F.3d 1082, 1088 (1994).

Plaintiffs have sufficiently alleged that CCA's policy or custom of overcrowding and understaffing resulted in almost no dayroom space available to prisoners or supervised time out of their cells, which in turn resulted in a deprivation of their right to adequate exercise. *See Monell*, 436 U.S. at 690-94. Plaintiffs may therefore proceed against CCA on these claims for monetary and injunctive relief.

For the same reasons as stated in Sections 3.B. and 3.C., above, Plaintiffs may not proceed against Defendants Otter, Wasden, Sandy, Van Tassel, or Nielson on their claims of inadequate dayroom space and inadequate out-of-cell time. Warden Wengler and Director Reinke may be sued on these claims for injunctive relief, but not damages.

E. Sixteenth, Eighteenth, and Nineteenth Claims for Relief: Inadequate Medical Treatment

Plaintiffs claim that Defendants Otter, Wasden, Sandy, Van Tassel, Nielson, Reinke, and Corizon violated the Eighth Amendment by failing to provide adequate medical care. In the medical context, a conclusion that a defendant acted with deliberate indifference requires that the plaintiff show both "a purposeful act or failure to respond to a prisoner's pain or possible medical need and . . . harm caused by the indifference." *Jett v. Penner*, 439 F.3d 1091, 1096 (9th Cir. 2006). Deliberate indifference can be "manifested by prison doctors in their response to the prisoner's needs or by prison guards in intentionally denying or delaying access to medical care or intentionally interfering with the treatment once prescribed." *Estelle v. Gamble*, 429 U.S. 97, 104-05 (1976) (footnotes omitted).

Differences in judgment between an inmate and prison medical personnel regarding appropriate medical diagnosis and treatment are not enough to establish a deliberate indifference claim, *Sanchez v. Vild*, 891 F.2d 240, 242 (9th Cir. 1989), nor is mere indifference, medical malpractice, or negligence, *Broughton v. Cutter Labs.*, 622 F.2d 458, 460 (9th Cir. 1980) (per curiam). A mere delay in treatment does not constitute a violation of the Eighth Amendment unless the delay causes further harm. *McGuckin v. Smith*, 974 F.2d 1050, 1060 (9th Cir. 1992), *overruled on other grounds by WMX Technologies, Inc. v. Miller*, 104 F.3d 1133 (9th Cir. 1997) (en banc). If medical personnel have been "consistently responsive to [the inmate's] medical needs," and there

has been no showing that the medical personnel had "subjective knowledge and conscious disregard of a substantial risk of serious injury," there is no Eighth Amendment violation. *Toguchi v. Chung*, 391 F.3d 1051, 1061 (9th Cir. 2004).

Plaintiffs have not raised a plausible inference that Defendant Corizon has a policy or custom of providing inadequate medical treatment. Nor does the Complaint contain any allegations that Defendants Otter, Wasden, Sandy, Van Tassel, Nielson, or Reinke were personally involved in Plaintiffs' medical treatment, or that as supervisors they knew of but failed to prevent a constitutional violation. Plaintiffs may not proceed on these claims in this action.

If any Plaintiff wishes to reassert his medical treatment claims, he should file a new, individual action. A multi-plaintiff pro se lawsuit is rarely an appropriate vehicle for adjudicating claims of inadequate medical care in prison, given the confidentiality and security concerns inherent in cases involving inmates' medical and mental health records. Because each claim will turn on each inmate's particular (and confidential) medical treatment, the claims do not arise out of the same transaction, occurrence, or series of transactions or occurrences as required for permissive joinder. Fed. R. Civ. P. 20(a)(1)(A). The Court also concludes that the inherent security risks involved with inmates having possession of each other's confidential medical records outweigh any benefit of joinder. Moreover, Plaintiffs have improperly included in their Complaint potentially sensitive narratives of the medical treatment of inmates who are not parties to this action. Plaintiffs should refrain from doing so in future cases.

F. Seventeenth Claim for Relief Against Defendant Wasden: Negligent Administration of Contracts with Corizon

Plaintiffs contend that Attorney General Wasden was negligent in maintaining or supervising the IDOC's contract with Corizon for the provision of medical services in Idaho prisons. (Compl. ¶345.) These claims fail because negligence is not actionable under § 1983. *Daniels v. Williams*, 474 U.S. 327, 328 (1986). The Complaint also fails to state a colorable negligence claim under Idaho law because it does not contain any specific allegations about Wasden's conduct or how his administration of the Corizon contract was negligent. Plaintiffs may not proceed on this claim.

G. Twenty-Fourth Claim for Relief: Failure to Protect from Assault at ISCI

Plaintiffs allege that Defendant Reinke and ISCI prison staff have violated Plaintiffs' Eighth Amendment right to protection from other inmates. (Compl. ¶385.) Prison officials who act with deliberate indifference "to the threat of serious harm or injury" by one prisoner against another are subject to liability under § 1983. *Berg v. Kincheloe*, 794 F.2d 457, 459 (9th Cir. 1986). "Having incarcerated persons with demonstrated proclivities for antisocial criminal, and often violent, conduct, having stripped them of virtually every means of self-protection and foreclosed their access to outside aid, the government and its officials are not free to let the state of nature take its course." *Farmer*, 511 U.S. at 833 (internal quotation marks, citation, and alterations omitted). Although even an obvious danger does not result in liability if the official is not subjectively aware of it, a prison official cannot "escape liability for deliberate

indifference by showing that, while he was aware of an obvious, substantial risk to inmate safety, he did not know that the complainant was especially likely to be assaulted by the specific prisoner who eventually committed the assault." *Id.* at 843.

Plaintiffs list several alleged victims of inmate-on-inmate violence identified as "Prisoner A", "Prisoner B", "Prisoner C", and so on.[1] (Compl. ¶¶223-72.) The number of violent incidents described by Plaintiffs are sufficient at this stage of the proceedings to raise a plausible inference that Defendant Reinke and various correctional officers were aware of a substantial risk of serious harm posed by inmate-on-inmate violence, yet failing to act to prevent that harm. Therefore, Plaintiffs may proceed on their failure-to-protect claims against Defendant Reinke. If Plaintiff learns the identities of specific prison staff members who were on notice of a serious risk of harm to Plaintiffs, they may move to amend their complaint to add those defendants.

4. Twenty-Fifth, Twenty-Sixth, Twenty-Seventh, and Twenty-Eighth Claims for Relief: First Amendment Retaliation

Plaintiffs allege that Defendants Otter, Wasden, Sandy, Van Tassel, Nielson, Reinke, CCA, Wengler, and Corizon retaliated against them in violation of the First Amendment. A retaliation claim must allege the following: "(1) An assertion that a state actor took some adverse action against an inmate (2) because of (3) that prisoner's protected conduct, . . . that such action (4) chilled the inmate's exercise of his First Amendment rights, and (5) the action did not reasonably advance a legitimate

[1] The identities of these prisoners are disclosed in a document filed by Plaintiffs along with a Motion to Seal, discussed below.

correctional goal." *Rhodes v. Robinson*, 408 F.3d 559, 567-68 (9th Cir. 2005) (footnote omitted). Although a "chilling effect on First Amendment rights" is enough to state an injury, *Gomez v. Vernon*, 255 F.3d 1118, 1127 (9th Cir. 2001), "bare allegations of arbitrary retaliation" are insufficient to state a retaliation claim. *Rizzo v. Dawson*, 778 F.2d 527, 532 n.4 (9th Cir. 1985).

But not every retaliatory act taken by an official can be considered an adverse action that chills the exercise of protected speech. The proper inquiry in determining whether a plaintiff has stated a viable retaliation claim "asks whether an official's acts would chill or silence a person of ordinary firmness from future First Amendment activities." *Mendocino Envt'l Ctr. v. Mendocino Cnty.*, 192 F.3d 1283, 1300 (9th Cir. 1999) (internal quotation marks omitted). If it would not, then "the retaliatory act is simply *de minimis* and therefore outside the ambit of constitutional protection." *Davis v. Goord*, 320 F.3d 346, 353 (2d Cir. 2003) (internal quotation mark omitted). *See also Morris v. Powell*, 449 F.3d 682, 686 (5th Cir. 2006) ("The [*de minimis*] standard achieves the proper balance between the need to recognize valid retaliation claims and the danger of federal courts embroiling themselves in every disciplinary act that occurs in state penal institutions.") (internal quotation marks and alteration omitted); *ACLU of Maryland, Inc. v. Wicomico County*, 999 F.2d 780, 786 n.6 (4th Cir. 1993) (per curiam) ("[T]hese § 1983 plaintiffs suffered no more than a *de minimis* inconvenience and . . . , on the facts of this case, such inconvenience does not constitute cognizable retaliation under the First Amendment.").

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Plaintiff Wolf alleges that he was transferred from ICC to ISCI in April 2011 in retaliation for a complaint about the conditions at ICC. (Compl. ¶279-81.) The West Wing Unit showers had to be repaired, and Mr. Wolf contends that the dust from removing the grout in the showers began to affect his and other inmates' health. When Mr. Wolf informed Unit Manager Brian Johnson of the problem, Johnson said, "I'll just move you." (*Id.* ¶279.) Mr. Wolf also alleges that he used the grievance system once he was moved to ISCI, and that in retaliation for that activity he was transferred to a Colorado prison housing Idaho prisoners under contract with the IDOC. (*Id.* ¶¶289-90.)

Plaintiffs have not sufficiently alleged that Defendants retaliated against them for exercising their constitutional rights. In fact, the "obvious alternative explanation" for Johnson's remark is that he was trying to alleviate Plaintiff's health concerns with respect to the grout removal. *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 567 (2007). If an inmate complains that the condition in which he is living is substandard, offering to move that inmate is not necessarily evidence of retaliation.

The Complaint is also insufficient with respect to Plaintiff Wolf's transfer to Colorado. This alleged retaliatory transfer took place nearly a year after Plaintiff exercised his right to file grievances with prison administration. Although the timing of an official's act can be circumstantial evidence of a retaliatory intent, *see Pratt v. Rowland*, 65 F.3d 802, 808 (9th Cir. 1995), a one-year delay casts no light on the motive behind the eventual transfer.

Moreover, there are no allegations that Defendants Otter, Wasden, Sandy, Van

Tassel, Nielson, Reinke, or Wengler personally participated in any alleged retaliation, or that they knew of but failed to prevent retaliatory acts undertaken by their subordinates. And Plaintiffs do not allege any facts supporting an inference that Defendant CCA or Corizon has a policy or custom of retaliating against inmates for filing suit or for using the grievance process.

Other than the broad statement that Plaintiffs Kruger and Begley are "in fear of retaliation," the Complaint does not assert a retaliation claim on behalf of these two Plaintiffs. Plaintiffs may not proceed on their retaliation claims.

5. Twenty-Ninth and Thirtieth Claims for Relief: Deprivation of Timely Parole Revocation Hearing and Counsel

Plaintiffs assert that Defendants Otter, Wasden, Craven, Young, Funaiole, Dressen, Lagerak, Matthews, and Reinke are violating Plaintiff Begley's (and other unnamed inmates') Fourteenth Amendment right to a timely parole revocation. Prisoner plaintiffs may bring claims of violations of due process in parole proceedings under 42 U.S.C. § 1983, rather than habeas corpus, so long as they do not challenge the fact or duration of their confinement. *Wilkinson v. Dotson*, 544 U.S. 74, 82 (2005). In other words, an inmate may seek to "invalidate state procedures used to deny parole eligibility . . . and parole suitability," but he may not seek "an injunction ordering his immediate or speedier release into the community." *Id*. At most, an inmate can seek as a remedy "consideration of a new parole application" or "a new parole hearing," which may or may not result in an actual grant of parole. *Id*. (emphasis omitted).

Due process in parole revocation proceedings requires "an informal hearing structured to assure that the finding of a parole violation will be based on verified facts and that the exercise of discretion will be informed by an accurate knowledge of the parolee's behavior." *Morrissey v. Brewer*, 408 U.S. 471, 484 (1972). A probable cause hearing on the charge must be held "as promptly as convenient after arrest while information is fresh and sources are available." *Id.* at 485. At the hearing, a parolee "is entitled to notice of the alleged violations . . . , an opportunity to appear and to present evidence in his own behalf, a conditional right to confront adverse witnesses, an independent decisionmaker, and a written report of the hearing." *Gagnon v. Scarpelli*, 411 U.S. 778, 786 (1973).

Mr. Begley is the only Plaintiff identified as being in custody pending a parole revocation hearing: Plaintiff Begley was under supervision in California pursuant to an interstate compact when he allegedly violated his parole. However, the Complaint is unclear as to whether Mr. Begley has received the process he was due. According to the Complaint, parolees charged with technical parole violations (a violation of the terms of parole other than committing another crime or absconding from parole) are entitled under Idaho law to "a preliminary hearing and an on-site hearing *to determine guilt or innocence* within thirty (30) days from the date the accused was served with the charges of the violation." (Compl. ¶295 (emphasis added).) This appears to satisfy the *Morrisey*/*Gagnon* due process requirements, and Plaintiff Begley acknowledges that he received a preliminary hearing in California, as well as an on-site hearing in Idaho within

two weeks of returning to the state. But Mr. Begley also alleges that he has been waiting over 6 months for a parole revocation hearing.

Given the lack of clarity of Mr. Begley's allegations, the Court will allow him to file a supplement to the Complaint within 30 days of the date of this Order, setting forth precisely what each parole hearing entailed. Further, given that several months have passed since Plaintiffs filed their Complaint, Mr. Begley might wish to include allegations regarding whether he has yet been afforded a revocation hearing and, if so, the result of that hearing. If the supplement sufficiently raises a reasonable inference that Mr. Begley has been denied due process in his parole revocation proceedings, the Court will at that time allow him to proceed on this claim.

Plaintiffs also contend that all Idaho parolees subject to revocation proceedings must be provided counsel at state expense. The Idaho Administrative Procedures Act provides for a state-appointed lawyer in parole revocation proceedings only if the Idaho Commission of Pardons and Parole, its executive director, or a hearing officer determines "that there is a colorable claim that the alleged violation(s) did not occur, that the alleged parole violator does not understand the proceedings, or is otherwise incapable of representing himself." (Compl. ¶94.) *See also* IDAPA 50.01.400.05.

As the Supreme Court held in *Gagnon*, "the decision as to the need for counsel must be made on a case-by-case basis in the exercise of a sound discretion by the state authority charged with responsibility for administering the probation and parole system." 411 U.S. at 790. The Idaho rule on counsel in parole revocation proceedings satisfies this

standard, and Plaintiffs therefore may not proceed on these claims.

Finally, Plaintiff's Complaint includes allegations regarding forfeiture of street time on parole. Idaho law provides that a parolee who violates the conditions of his parole forfeits all the time served on parole unless the Idaho Commission of Pardons and Parole determines otherwise. Idaho Code § 20-228. Plaintiffs allege that the problems of overcrowding within Idaho prisons could be alleviated if the Commission decided to credit all good behavior time served by a parolee up to the date of the violation. (Compl. at ¶306.) Parole violators would thus spend less time in prison, freeing up space to house other inmates.

As explained above, prison overcrowding is not itself a freestanding constitutional violation. To the extent that Plaintiffs assert an independent procedural due process claim arising from the Commission's decision not to credit time served on parole, their claims fail for at least two reasons. First, Plaintiffs do not allege that they suffered any such forfeiture. Rather, they identify *other* inmates who have served good behavior time on parole yet were not credited for that time upon revocation and reincarceration.

Second, there is no constitutional right to parole, and as a result, an inmate can bring a procedural due process challenge to a parole decision only where there is a state-created liberty interest in parole. *See Swarthout v. Cooke*, 131 S. Ct. 859, 862 (2011) ("There is no right under the Federal Constitution to be conditionally released before the expiration of a valid sentence, and the States are under no duty to offer parole to their prisoners."). Federal courts look to decisions of the highest state court to determine

whether there is a state-created liberty interest in parole. *See West v. AT&T Co.*, 311 U.S. 223, 236 (1940) ("[T]he highest court of the state is the final arbiter of what is state law . . . [and] its pronouncement is to be accepted by federal courts as defining state law."). In *Banks v. Idaho*, 920 P.2d 905, 908 (Idaho 1996), the Idaho Supreme Court determined that under the Idaho statutory scheme, there is no liberty interest in parole in Idaho. Therefore, Plaintiffs may not proceed on their challenges to parole time forfeiture.

APPLICATIONS TO PROCEED IN FORMA PAUPERIS

For any litigant to file a civil complaint in federal court, that litigant must either pay the filing fee in full at the time of filing or seek in forma pauperis status, which allows the litigant to pay the filing fee over time. In either case, the litigant must pay the full filing fee for having filed the complaint, regardless of whether the litigant's case is eventually dismissed or is otherwise unsuccessful. As of May 1, 2013, the Judicial Conference instituted a $50 administrative fee for filing a civil action in district court. Therefore, the fee for filing a new civil case has increased to $400 ($350 filing fee + $50 administrative fee). The $50 administrative fee, however, does not apply to cases filed by pro se prisoner plaintiffs who are proceeding in forma pauperis.

Plaintiffs have each filed an Application to Proceed in Forma Pauperis. The Court finds it appropriate to grant Plaintiff Wolf's Application, as well as Plaintiff Kruger's Application. These Plaintiffs will be allowed to pay their portions of the $350 filing fee over time according to the schedule set forth in 28 U.S.C. § 1915(b)(1). That portion is $116.67 each ($350 divided by three Plaintiffs). Because the Court does not know the

current balance of Plaintiff Wolf's or Plaintiff Kruger's account, it will waive payment of an initial partial filing fee. These two Plaintiffs shall be required to make monthly payments of twenty (20) percent of the preceding month's income credited to their institutional accounts. The agency having custody of Plaintiffs Wolf and Kruger shall forward payments from their respective accounts to the Clerk of the Court each time the amount in the account exceeds ten (10) dollars, until the $116.67 portion of the filing fee is paid in full by each of these two Plaintiffs.

However, the Court will deny Plaintiff Begley's Application to Proceed in Forma Pauperis. Mr. Begley has had over $1,600 deposited into his account in approximately one year. Because all of his basic needs are paid for by the State during incarceration, it appears that Mr. Begley can obtain sufficient funds to afford the costs of this litigation. Therefore, Plaintiff Begley must pay his portion of the $350.00 filing fee and, because he will not be proceeding in forma pauperis, an additional $50 for the administrative fee. Thus, Plaintiff Begley is directed to pay $166.67 ($116.67 for his portion of the filing fee + $50 for the administrative fee) within the next 180 days, or his claims will be dismissed without prejudice. The fee may be paid in incremental payments.

PENDING MOTIONS

1. Motion for Appointment of Counsel

Plaintiffs seek appointment of counsel. Unlike criminal defendants, prisoners and indigents in civil actions have no constitutional right to counsel unless their physical liberty is at stake. *Lassiter v. Dep't of Social Services*, 452 U.S. 18, 25 (1981). Whether to

appoint counsel for indigent litigants is within the Court's discretion. *Wilborn v. Escalderon*, 789 F.2d 1328, 1331 (9th Cir. 1986).

In civil cases, counsel should be appointed only in "exceptional circumstances." *Id*. To determine whether exceptional circumstances exist, the court should evaluate two factors: (1) the likelihood of success on the merits of the case, and (2) the ability of the plaintiff to articulate his claims pro se in light of the complexity of legal issues involved. *Terrell v. Brewer*, 935 F.2d 1015, 1017 (9th Cir. 1990). Neither factor is dispositive, and both must be evaluated together. *Id*.

Applying the factors to this case, the Court finds that Plaintiffs' Complaint, liberally construed, states a claim upon which relief could be granted if the allegations are proven at trial. However, without more than the bare allegations of the Complaint, the court does not have a sufficient basis upon which to assess the merits, if any, at this point in the proceeding. The Court also finds that Plaintiffs have articulated his claims sufficiently, and that the legal issues are not complex in this matter. Based on the foregoing reasons the Court shall deny Plaintiffs' Motion for Appointment of Counsel. If it seems appropriate at a later date in this litigation, the Court will reconsider appointing counsel.

Plaintiffs should be aware that a federal court has no authority to require attorneys to represent indigent litigants in civil cases under 28 U.S.C. § 1915(d). *Mallard v. U.S. Dist. Court for S. Dist. of Iowa*, 490 U.S. 296, 298 (1989). Rather, when a Court "appoints" an attorney, it can do so only if the attorney voluntarily accepts the

assignment. *Id.* The Court has no funds to pay for attorney's fees in civil matters, such as this one. Therefore, it is often difficult to find attorneys willing to work on a case without payment, especially in prisoner cases, where contact with the client is especially difficult. For these reasons, Plaintiffs should attempt to procure their own counsel on a contingency or other basis, if at all possible.

2. Motion for Class Certification

The trial court has broad discretion whether to certify a case as a class action. *Kamm v. Cal. City Dev. Co.*, 509 F.2d 205, 210 (9th Cir. 1975). The Court has reviewed the class certification issue and determined that class certification is not necessary in this case at this time, based on the factors set forth in Federal Rule of Civil Procedure 23(b).

The extent and nature of this case weighs against class certification. *See* Fed. R. Civ. P. 23(b)(3)(B). This case is at a very early stage of litigation, the standards of law are very high and difficult to meet, and it is unclear whether the factual allegations are meritorious. Managing an inmate class action is an inherently difficult task, which the Court finds is not currently warranted given the uncertainty of the merits of the case. *See* Fed. R. Civ. P. 23(b)(3)(D).

3. Motion for Three-Judge Court

Plaintiffs request that this case be heard by a three-judge court, citing 18 U.S.C. § 3626(a)(3)(A). Section 3626(a)(3) provides that a prisoner release order may be issued only by a three-judge court. Plaintiffs do not seek release in this action, however, and therefore the Motion will be denied.

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4. Motion to Consolidate

Plaintiffs have moved to consolidate this case with *Balla v. Idaho State Board of Correction*, Case No. 1:81-cv-01165-BLW (D. Idaho). However, the only true connection between *Balla* and the instant action is Plaintiffs' claim that because of the *Balla* injunction's population caps on certain housing units, the IDOC has resorted to housing too many prisoners in other units that are not subject to the injunction, which allegedly results in several Eighth Amendment violations. The Court will deny the Motion to Consolidate.

5. Motion for Order Permitting Plaintiff Wolf to Communicate with Co-Plaintiffs

Plaintiff Wolf requests that he be allowed to communicate through the mail with Plaintiffs Kruger and Begley for purposes of pursuing this lawsuit. The Motion will be granted to the extent that all inmate-to-inmate communications must comply with current IDOC regulations regarding multi-party lawsuits. If Plaintiff Wolf is dismissed from this case, however, he will no longer need to communicate with the other Plaintiffs as a party to this action.

6. Plaintiff Wolf's Motion to Supplement His Declaration in Support of Motion for Preliminary Injunction

The Court grants Plaintiff Wolf's Motion to Supplement and has reviewed all of Plaintiffs' submissions in this case.

7. Motion for Preliminary Injunction

Plaintiffs seek a preliminary injunction. A Rule 65 preliminary injunction may be

granted if the moving party demonstrates the following elements: (1) that the moving party will suffer irreparable injury if the relief is denied; (2) that the moving party will probably prevail on the merits; (3) that the balance of potential harm favors the moving party; and (4) that the public interest favors granting relief. *Winter v. Natural Res. Defense Council, Inc*., 555 U.S. 7, 20 (2008); *Cassim v. Bowen*, 824 F.2d 791, 795 (9th Cir. 1987). Because a preliminary injunction is an extraordinary remedy, injunctive relief must be denied "unless the facts and law clearly favor the moving party." *Stanley v. Univ. of S. Cal.*, 13 F.3d 1313, 1320 (9th Cir. 1994) (internal quotation marks omitted).

Although Plaintiffs have alleged sufficient facts to proceed on some of their claims, at this early stage of the proceedings the Court cannot conclude that Plaintiffs are likely to succeed on the merits. The Motion will be denied.

8. Motion to Seal

The Court will grant Plaintiff's Motion to Seal because the document that Plaintiffs seek to seal contains the identities of inmates who have allegedly been injured or harassed by other prisoners. This sensitive information justifies sealing the document (Dkt. 14-1) at this time.

9. Motion for Reassignment

Plaintiffs request that this case be reassigned to a United States District Judge. Because the case has already been reassigned, the Motion is moot.

10. Plaintiff Wolf's Motion for Sanctions and Return of Confidential Work Product

The Court will deny Plaintiff Wolf's Motion for Sanctions and Return of Confidential Work Product for two reasons. First, because the Defendants have not been served, they are not yet parties to this case. Second, Plaintiff's Motion is based on events that occurred after the Complaint was filed. If Plaintiff wishes to pursue these allegations in a new lawsuit, he may do so.

CONCLUSION

This Order does not guarantee that any of Plaintiffs' claims will be successful; it merely finds that some are colorable, meaning that the claims will not be summarily dismissed at this stage. This Order is not intended to be a final or comprehensive analysis of Plaintiffs' claims. It is Plaintiffs' burden to thoroughly set forth the legal and factual basis for each of their claims so that Defendants can properly defend against them.

ORDER

IT IS ORDERED:

1. Plaintiffs may proceed on the following claims against the following Defendants at this time:
    a. Third, Fourth, Fourteenth, and Fifteenth Claims for Relief against Defendant Reinke (injunctive relief).
    b. Fifth and Sixth Claims for Relief against Defendant Reinke (injunctive relief).
    c. Twelfth, Thirteenth, Twentieth, and Twenty-First Claims for Relief against CCA (damages and injunctive relief); and against Wengler and Reinke (injunctive relief).
2. At this time, Plaintiff Begley may not proceed on his claims that he was denied a timely parole revocation hearing, but the Court will allow him to file a supplement within 30 days as explained above.
3. Plaintiff Wolf's Application to Proceed In Forma Pauperis (Dkt. 1) and

Plaintiff Kruger's Application to Proceed in Forma Pauperis (Dkt. 3) are GRANTED. These Plaintiffs are obligated to pay their portion of the statutory filing fee of $350.00 for this action ($116.67 each), but they will not be assessed an initial partial filing fee at this time. Separate orders directing prison officials to deduct monies from these Plaintiffs' prison trust accounts will issue.

4. Plaintiff Begley's Application to Proceed in Forma Pauperis (Dkt. 5) is DENIED. Within 180 days, Plaintiff Begley must pay his portion of the filing fee, plus the $50 administrative fee, for a total of $166.67. This total may be paid in installments. If Plaintiff Begley fails to pay the fee, his claims will be dismissed without prejudice.

5. Plaintiffs' Motion for Appointment of Counsel (Dkt. 8) is DENIED.

6. Plaintiffs' Motion for Class Certification (Dkt. 9) is DENIED.

7. Plaintiffs' Motion for Three-Judge Court (Dkt. 10) is DENIED.

8. Plaintiffs' Motion to Consolidate (Dkt. 11) is DENIED.

9. Plaintiff Wolf's Motion for an Order Permitting Plaintiff Andrew Wolf to Communicate with Co-Plaintiffs (Dkt. 12) is GRANTED only to the extent that the parties follow the prison's procedures, rules, and regulations governing inmate-to-inmate correspondence in multi-party lawsuits; and (c) that Mr. Wolf remains a party to this action.

10. Plaintiff Wolf's Motion to Supplement his Declaration in Support of

Motion for Preliminary Injunction (Dkt. 23) is GRANTED.

11. Plaintiffs' Motion for Preliminary Injunction (Dkt. 13) is DENIED.

12. Plaintiffs' Motion to Seal (Dkt. 14) is GRANTED. The identification list (Dkt. 14-1) is hereby ordered SEALED.

13. Plaintiffs' Motion for Reassignment (Dkt. 20) is MOOT.

14. Plaintiffs' Motion for Sanctions and Return of Confidential Work Product (Dkt. 24) is DENIED.

15. Defendants shall be allowed to waive service of summons by executing, or having counsel execute, the Waiver of Service of Summons as provided by Federal Rule of Civil Procedure 4(d) and returning it to the Court within thirty (30) days. If Defendants choose to return the Waiver of Service of Summons, the answer or pre-answer motion shall be due in accordance with Rule 12(a)(1)(A)(ii).

16. Accordingly, the Clerk of Court shall forward a copy of the Complaint (Dkt. 3), a copy of this Order, a copy of Plaintiff Wolf's Motion for an Order Permitting Plaintiff Andrew Wolf to Communicate with Co-Plaintiffs (Dkt. 12), and a Waiver of Service of Summons to the following attorneys:

    a. **Paul Panther, Deputy Attorney General for the State of Idaho, Idaho Department of Correction, 1299 North Orchard Street, Suite 110, Boise, Idaho, 83706**, on behalf of Defendant Reinke;

    b. **Steve Groom, Deputy General Counsel, Corrections Corporation**

of America (CCA), 10 Burton Hills Boulevard, Nashville, TN 37215, on behalf of Defendants CCA and Wengler; and

c. **Kirtlan Naylor, Naylor & Hales, P.C. 950 W. Bannock, Ste. 610, Boise, ID 83702**, also on behalf of Defendants CCA and Wengler.

17. Should any entity determine that the individuals for whom it was served are not, in fact, its employees or former employees, or that its attorney will not be appearing for particular former employees, it should file a notice of nonrepresentation immediately via the CM/ECF system, with a copy to Plaintiffs.

18. The parties shall not engage in any discovery until an answer has been filed. Within 30 days after an answer has been filed, the parties shall provide each other with the following voluntary disclosures: all relevant information pertaining to the claims and defenses in this case, including the names of individuals likely to have discoverable information, along with the subject of the information, as well as any relevant documents in their possession, in a redacted form if necessary for security or privilege purposes; and, if necessary, they shall provide a security/privilege log sufficiently describing any undisclosed relevant documents which are alleged to be subject to nondisclosure. Any party may request that the Court conduct an *in camera* review of withheld documents or information. If, instead of filing an answer, Defendants file a motion to dismiss under Federal Rule of Civil

Procedure 12, disclosures and discovery shall be automatically stayed with the exception that Defendants shall submit with any motion to dismiss for failure to exhaust administrative remedies a copy of all grievance-related forms and correspondence, including a copy of original handwritten forms submitted by Plaintiff that either fall within the relevant time period or otherwise relate to the subject matter of a claim.

19. Discovery shall not be filed with the Clerk of Court, but shall be exchanged only between parties as provided in the Federal Rules of Civil Procedure. Motions to compel discovery shall not be filed unless the parties have first attempted to work out their disagreements between themselves.

20. Each party shall ensure that all documents filed with the Court are simultaneously served upon the opposing party (through counsel if the party has counsel) by first-class mail or via the CM/ECF system, pursuant to Federal Rule of Civil Procedure 5. Each party shall sign and attach a proper mailing certificate to each document filed with the Court, showing the manner of service, date of service, address of service, and name of the person upon whom service was made. The Court will not consider *ex parte* requests unless a motion may be heard *ex parte* according to the rules and the motion is clearly identified as requesting an *ex parte* order, pursuant to Local Rule of Civil Practice before the United States District Court for the District of Idaho 7.2. ("*Ex parte*" means that a party has provided a

document to the Court but did not provide a copy of the document to the other party to the litigation.)

21. All Court filings requesting relief or requesting that the Court make a ruling or take an action of any kind must be in the form of a pleading or motion, with an appropriate caption designating the name of the pleading or motion, served on all parties to the litigation, pursuant to Federal Rules of Civil Procedure 7, 10, and 11 and Local Rules of Civil Practice before the United States District Court for the District of Idaho 5.1 and 7.1. The Court will not consider requests made in the form of letters.

22. No party may have more than three pending motions before the Court at one time, and no party may file a motion on a subject matter if he or she has another motion on the same subject matter currently pending before the Court.

23. Plaintiffs shall notify the Court immediately if their addresses change. Failure to do so may be cause for dismissal of this case without further notice.

DATED: **June 13, 2013**

Honorable B. Lynn Winmill
Chief U. S. District Judge