

STEPHEN L. PEVAR  
American Civil Liberties Union Foundation  
2074 Park Street  
Hartford, Connecticut 06106  
(860) 570-9830

LEA C. COOPER ISB # 3505  
American Civil Liberties Union of Idaho Foundation  
P.O. Box 1897  
Boise, Idaho 83701  
(208) 344-9750 ext. 206

JAMES D. HUEGLI ISB # 8172  
Cooperating Attorney, ACLU of Idaho Foundation  
1770 W. State St., Suite 267  
Boise, ID 83702  
(208) 631-2947

Attorneys for Plaintiffs

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF IDAHO

MARLIN RIGGS, et al,	)	Case No. 1:09-cv-00010-BLW
	)	
Plaintiffs,	)	PLAINTIFFS' MEMORANDUM
	)	
vs.	)	IN OPPOSITION TO DEFENDANTS'
	)	
PHILIP VALDEZ, et al,	)	MOTION TO DISMISS
	)	
Defendants.	)	

**INTRODUCTION**

Plaintiff Marlin Riggs filed his *pro se* lawsuit in January 2009 seeking individual damages. (Docket No. 3.) Fourteen months later on March 11, 2010, and with leave of the Court, Riggs filed an Amended Complaint. (Docket No. 16.) The Amended Complaint added five named plaintiffs (the "class plaintiffs") who seek equitable relief

for themselves and all other persons similarly situated. On June 30, 2010, Riggs and the five class plaintiffs obtained the Court's consent to file their Second Amended Complaint (SAC), which, *inter alia*, added a sixth class plaintiff. (Docket No. 71.)

The SAC seeks individual damages on behalf of Marlin Riggs, one of seven named plaintiffs. The other named plaintiffs seek broad, prophylactic declaratory and injunctive relief on their own behalf and on behalf of all other prisoners confined in the Idaho Correctional Center (ICC) in Kuna, Idaho. ICC is administered by Corrections Corporation of America (CCA), a private company, pursuant to a contract with the Idaho Department of Corrections. CCA is a defendant in the SAC.

With respect to the class action portion of this litigation, the SAC asserts that for years now--and in direct violation of the Eighth Amendment--CCA and the administrators of ICC have been deliberately indifferent to incessant prisoner-on-prisoner violence. Defendants' indifference has precipitated such ferocious assaults at ICC that scores of prisoners have been permanently injured, and many have been disfigured, including Marlin Riggs. The SAC describes assaults that occurred to twenty-three victims since November 2006, including the six class plaintiffs.

Defendants have filed a motion, along with a memorandum, seeking to dismiss the claims of all six class plaintiffs. (Docket Nos. 73 and 74.) If successful, Defendants' motion would eliminate all but Mr. Riggs's claim for damages. Defendants make four arguments in support of their motion, the first three of which contend that the class plaintiffs failed to adequately exhaust their administrative remedies in violation of the Prison Litigation Reform Act (PLRA), 42 U.S.C. § 1997e(a). The fourth argument raises

an issue of standing. All four arguments lack merit. Plaintiffs will now address those arguments in the order in which they are set forth in Defendants' memorandum.

**I. THE SIX CLASS PLAINTIFFS COULD NOT COMPLAIN IN JANUARY 2009 ABOUT CONSTITUTIONAL VIOLATIONS THAT HAD NOT YET OCCURRED**

Marlin Riggs filed his *pro se* lawsuit in January 2009. All six class plaintiffs were assaulted many months later. Yet Defendants contend that because the class plaintiffs did not file grievances prior to January 2009--before they had been assaulted--their claims must be dismissed. *See* Memorandum in Support of Defendants' Motion to Dismiss Second Amended Complaint (hereinafter "Defs' Mem.") at 7 (arguing that the claims of the class plaintiffs must be dismissed because these plaintiffs are "in noncompliance with [the PLRA's] express mandate that exhaustion occur 'prior to filing suit.'").

There are two reasons why Defendants' argument lacks merit. First, Defendants are using the wrong date as the benchmark for when suit was "filed." True, Mr. Riggs's individual lawsuit was filed in January 2009. But the class claims were added more than a year later when Plaintiffs' Amended Complaint was filed on March 11, 2010. Thus, as to the class plaintiffs, the relevant inquiry is whether their claims were exhausted prior to March 11, 2010, not January 2009.

All of the cases cited by Defendants stand for the principle that prisoners must exhaust *their own claims* prior to filing suit. In other words, had Riggs sought to exhaust his claim for damages after January 2009, such post-filing efforts would not comport with the PLRA. Defendants' cases have no application to a situation where, as here, new plaintiffs, whose claims had not yet arisen when suit was initially filed, are permitted by the court to join a lawsuit through an amended complaint. Defendants cite no case that is

relevant, and cannot. *See Hiser v. Franklin*, 94 F.3d 1287, 1291 (9<sup>th</sup> Cir. 1996), *cert. denied*, 520 U.S. 1103 (1997) (holding that a prisoner is not expected to inject his claim into a lawsuit that was filed before his claim even arose). Thus, the operative date for the class plaintiffs is March 11, 2010, not January 2009.

Defendants note in their brief, and correctly so, that "a plaintiff cannot circumvent the PLRA's exhaustion requirement by simply amending his complaint." Defs' Mem. at 6. Thus, had Riggs *not* exhausted his own claims before filing suit but instead attempted to circumvent the PLRA by adding new plaintiffs who had exhausted their claims, he would be barred from amendment. Here, however, that is not the situation, and thus the cases cited by Defendants are inapposite.

As Plaintiffs explained the last time Defendants asked the Court to dismiss (*see* Defendants' Motion to Strike, Docket No. 31) these very same class claims, federal courts routinely allow amendments under Rule 15(a) that add new parties and new claims to a lawsuit. *See Roth v. Garcia Marquez*, 942 F.2d 617, 629 (9<sup>th</sup> Cir. 1991); *DCD Programs, Ltd. v. Leighton*, 833 F.2d 183, 186 (9<sup>th</sup> Cir. 1987). This is as true in prisoner litigation as elsewhere. For instance, in class actions, plaintiffs who have been released from the facility are often replaced with other prisoners currently incarcerated. *See Gluth v. Kangas*, 951 F.2d 1504, 1509 (9<sup>th</sup> Cir. 1991) (affirming a district court's decision to add "three new named plaintiffs" after an original plaintiff had been released from prison); *Balla v. Idaho State Board of Corrections*, Civ. No. 81-1165 (D. Idaho, Order dated Dec. 12, 2007) (Docket No. 724) at 11 (granting motion to allow the addition of four new class representatives).

Riggs circumvented nothing. He could have pursued his own viable (and administratively exhausted) claim. However, he chose to avail himself of the right secured by Rule 15(a) to amend his complaint to add new parties and new claims. As this Court explained in denying Defendants' Motion to Strike, there is a "strong public policy in favor of amendments so that all claims may be heard in one proceeding rather than through piecemeal litigation." *See* Order of April 28, 2010 (Docket No. 36) (hereinafter "April Order") at 4, citing *Allwaste, Inc. v. Hecht*, 65 F.3d 1523, 1530 (9<sup>th</sup> Cir. 1995). For this reason alone, Defendants' argument should be rejected.

The second reason why Defendants' argument lacks merit is because it violates the law of the case. Under that doctrine, a party is estopped from raising an issue that the party already litigated and lost, and this includes issues that were "decided explicitly *or by necessary implication* in [the] previous disposition." *Lower Elwha Band of S'Klallams v. Lummi Indian Tribe*, 235 F.3d 443, 452 (9<sup>th</sup> Cir. 2000) (emphasis added) (internal quotation marks omitted). *See also Old Person v. Brown*, 312 F.3d 1036, 1039 (9<sup>th</sup> Cir. 2002).

Defendants' "new" argument is essentially the same one that this Court previously rejected. *See* April Order. Defendants previously filed a motion seeking dismissal of the class claims. For reasons explained below, when the Court denied that motion, the Court necessarily rejected the argument that Defendants make today. This will become clear once we examine the facts underlying the Court's April Order.

Riggs filed his lawsuit in January 2009 seeking damages against several employees of ICC. The Court consolidated Riggs's case with several other pending *pro se* failure to protect cases that were seeking similar relief against similar defendants at

ICC. In its April Order, the Court summarized the reasons why the Court had consolidated all of those cases: "The Court originally intended to consolidate similar failure to protect cases for ease of administration and possible early mediation." *See* Order at 4. Subsequently, the Court removed Riggs's case from the consolidated case when it became clear that, whereas Riggs had successfully exhausted his administrative remedies, most of the other consolidated plaintiffs had not exhausted theirs. *Id.* at 3. Counsel was then appointed to represent Riggs and, soon thereafter, Riggs filed an Amended Complaint in which he added five class plaintiffs who had been assaulted in October 2009 and who were seeking classwide declaratory and injunctive relief.

The Amended Complaint was filed on March 11, 2010. Promptly thereafter, Defendants filed a motion requesting that the Court dismiss all claims of the plaintiff class, arguing that Defendants would be prejudiced if the class plaintiffs were permitted to "piggyback" their claims onto those of Riggs. *See* April Order at 4 ("Defendants contend that the class is essentially 'piggybacking' onto Riggs's lawsuit, which will cause case management problems and prejudice to Defendants.") The Court rejected Defendants' contentions, explaining that, first, the Court had already consolidated Riggs's case with other cases, and Defendants had shown no compelling reason for "splitting apart the plaintiffs and claims at this time"; second, had the class plaintiffs filed their claims separately from Riggs's claims, "it is likely the Court would have consolidated the cases for discovery purposes to avoid a wasteful duplication of effort on similar claims"; third, Defendants will suffer no prejudice from the renewed consolidation of these claims because the damages claim of Riggs and the injunctive claim of the class can proceed to trial separately; and fourth, "[t]here is a strong public policy in favor of amendments so

that all claims may be heard in one proceeding rather than through piecemeal litigation." April Order at 4, citing *Allwaste, Inc. v. Hecht*, 65 F.3d 1523, 1530 (9<sup>th</sup> Cir. 1995).

Defendants' argument would result in an evisceration of the Court's April Order and render it nugatory. Clearly, when this Court authorized Riggs to amend his complaint and add prisoners whose claims arose *after* his, then "by necessary implication" the Court also ruled that these new plaintiffs would not be bound by his January 2009 exhaustion deadline. *See Lummi Indian Tribe*, 235 F.3d at 452. Stated more generally, where a court determines, as here, that a party who has successfully exhausted his/her own claims adds new plaintiffs under Rule 15(a), then those new plaintiffs must satisfy their own appropriate exhaustion deadlines, not someone else's. Accordingly, Defendants are estopped by the law of the case from relitigating this issue.

**II. CLASS PLAINTIFFS PIÑA, ROCHA, BARRIOS, KELLY, AND IBARRA EXHAUSTED THEIR ADMINISTRATIVE REMEDIES PRIOR TO FILING THEIR AMENDED COMPLAINT ON MARCH 11, 2010**

At the outset of their brief, Defendants concede that there are *two* methods of administrative exhaustion: a Grievance Process and a Disciplinary Offense Report (DOR) Process. *See* Defs' Mem. at 5 ("DORs are not matters that can be challenged through the grievance process, but rather must be challenged pursuant to ICC's disciplinary procedures.") (Citing Ex. 1, Penn Aff. ¶ 16.) Defendants then assert that the claims of class plaintiffs Jose Piña, Joe Rocha, Ray Barrios, Joshua Kelly, and Andrew Ibarra (the "Chow Hall 5") must be dismissed because these five men failed to exhaust the Grievance Process.

What Defendants ignore in making that argument is that their own policies required these men to exhaust their claims through the DOR Process, not the Grievance

Process, and all five men did so. Indeed, when three of these men attempted to use the Grievance Process while also pursuing their claims through the DOR Process, *ICC staff told them that they could only use the DOR Process*, a process they then completed. Defendants' brief entirely ignores this dispositive issue. Oddly, in fact, Defendants rely on an affidavit from Chester Penn in support of their argument, and yet Penn is one of the ICC employees who instructed these plaintiffs to use the DOR Process and not the Grievance Process.<sup>1</sup>

#### **A. Factual Background**

Here are the essential facts regarding this issue. There are two rival Hispanic gangs operating within ICC. *See* Declaration of Andrew Ibarra ("Ibarra Decl.") ¶ 4; Declaration of Joe Rocha ("Rocha Decl.") ¶ 3; Declaration of Joshua Kelly ("Kelly Decl.") ¶ 3. ICC administrators are well aware of this fact and usually take pains to house members of these gangs in separate areas of the prison, one gang in the North Wing and the other gang in the West Wing. *See* Ibarra Decl. ¶ 4; Rocha Decl. ¶¶ 3-4; Kelly Decl. ¶ 4.

Class plaintiffs Andrew Ibarra, Joe Rocha, and Joshua Kelly are known by other prisoners--and by ICC administrators--to be affiliated with one of these Hispanic gangs. *See* Ibarra Decl. ¶ 4; Rocha Decl. ¶¶ 6; Kelly Decl. ¶¶ 6, 9. Consistent with ICC policy, they were housed in the North Wing along with other prisoners who were members of that gang. Yet on October 9, 2010, ICC employees informed these three men that they

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<sup>1</sup> *See* Defendants' Exhibit 1 at 45-52 (showing that Ibarra and Rocha submitted grievances raising their failure to protect claims, only to have Chester Penn, the Grievance Coordinator, dismiss those grievances on the grounds that these claims needed to be raised through the DOR Process). These documents are discussed in more detail later in this brief.

were being moved that day to the West Wing. *See* Ibarra Decl. ¶ 5; Rocha Decl. ¶ 2; Kelly Decl. ¶ 2. All three men instantly knew that such a move would place them at grave risk of assault. *See* Ibarra Decl. ¶ 5; Rocha Decl. ¶ 5; Kelly Decl. ¶ 5.

In a frantic effort to avoid being moved to a dangerous environment, all three men beseeched ICC employees to intervene. Kelly asked his Case Manager, Ms. Fink, for help, but Fink refused to assist him, despite knowing that he faced a high likelihood of assault. *See* Kelly Decl. ¶¶ 5-8. Ibarra and Rocha jointly asked three staff members-- Officer Harold, Counselor Courtwright, and Sergeant Beach--to help them, but all three refused. *See* Ibarra Decl. ¶¶ 5-6; Rocha Decl. ¶ 5. Indeed, Kelly, Ibarra, and Rocha were admonished by staff that unless they moved, they would be issued DORs for disobeying a direct order, and these men were acutely aware that a DOR would seriously hurt their chances for parole. *See* Ibarra Decl. ¶ 6; Rocha Decl. ¶ 7; Kelly Decl. ¶ 7. Reluctantly, all three men packed their belongings and moved to the West Wing.

Within hours, all three men were assaulted by rival gang members. While seated in the chow hall eating their first meal, some fifteen members of the rival gang attacked them. Ibarra was knocked unconscious by a blow to the head, and Rocha suffered a serious injury to his leg. *See* Ibarra Decl. ¶ 9; Rocha Decl. ¶ 10; Kelly Decl. ¶ 10.

Unfortunately for class plaintiffs Jose Piña and Ray Barrios, they happened to be in the chow hall seated near Ibarra, Rocha, and Kelly. Apparently, gang members thought that Piña and Barrios were associated with the other three, and attacked them, too. Piña and Barrios were innocent bystanders. *See* Declaration of Jose Piña ("Piña Decl.") ¶¶ 3-4; Declaration of Ray Barrios ("Barrios Decl.") ¶¶ 3-4.

It should have been obvious to anyone who conducted even a cursory investigation of this incident that these five men, who were drastically outnumbered and calmly eating dinner when attacked, were not the aggressors and were trying to defend themselves from an attack after being placed in a dangerous situation by guards who were warned of the danger. Nevertheless, all five men were issued DORs for "fighting," and all five were handcuffed and placed in administrative segregation. *See* Ibarra Decl. ¶¶ 9-10; Rocha Decl. ¶¶ 10-11; Kelly Decl. ¶¶ 10-11; Pifia Decl. ¶¶ 4-5; Barrios Decl. ¶¶ 4-5.

After being placed in segregation, and believing that their right to be safe from assault had been violated, all five men decided to administratively challenge what had happened to them. Plaintiffs asked the officer on duty, Officer Soto, for forms so that they could complain about the incident. Soto told them that because they had been issued DORs, they *must* use the DOR Process, and not the Grievance Process. *See* Ibarra Decl. ¶¶ 13-14; Rocha Decl. ¶¶ 14-15; Kelly Decl. ¶¶ 14-15; Pifia Decl. ¶ 10; Barrios Decl. ¶ 8. Just to be on the safe side, Kelly, Ibarra, and Rocha, in addition to exhausting the DOR Process, also pursued remedies under the Grievance Process. Kelly and Ibarra submitted a Concern Form (the first step of the Grievance Process) to their Case Manager, Ms. Fink. Fink told both men that they could *not* raise their failure to protect issue through the Grievance Process but only through the DOR Process. *See* Ibarra Decl. ¶ 17; Kelly Decl. ¶ 16-17. A copy of Fink's written response to Kelly is attached as Exhibit 1 to Kelly's Declaration.<sup>2</sup> *See also* Defs Ex. 1 at 49-50 (Rocha Grievance).

Ibarra was able to obtain a grievance form from another prisoner, and he submitted it. *See* Ibarra Decl. ¶ 16. In the grievance form, Ibarra stated that he had

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<sup>2</sup> Mr. Ibarra did not keep his copy of the Concern Form. Ms. Fink may still have the original.

informed officers that he would not be safe in the new cell block, and sought dismissal of his DOR and return to his original cell block. *See* Defs' Ex. 1, Attachment F, at 45-46. However, Grievance Coordinator Chester Penn denied the grievance on the ground that a DOR cannot be grieved. *Id.* at 47. Penn also denied Rocha's grievance on the same grounds. *Id.* at 51,

All five men received hearings before a Disciplinary Hearing Officer (DHO), consistent with ICC policy. Prior to his hearing, Ibarra requested that the DHO call as witnesses two of the employees to whom he had spoken about the dangers of transfer. The DHO, however, refused to require their attendance. *See* Ibarra Decl. ¶¶ 18-19.

During their respective hearings, all five men told the DHO what had transpired, expressly informing the DHO that ICC employees were to blame for creating the incident by having moved Ibarra, Rocha, and Kelly into a cell block inhabited by a dangerous rival gang. Pifia and Barrios explained that they were innocent bystanders. *See* Ibarra Decl. ¶ 19; Rocha Decl. ¶ 17; Kelly Decl. ¶ 18; Pifia Decl. ¶ 8; Barrios Decl. ¶ 7. The DOR against Kelly was dismissed by his Hearing Officer. *See* Kelly Decl. ¶ 18. Nevertheless, Rocha, Ibarra, Pifia, and Barrios were found guilty of fighting by their Hearing Officers.

The DOR Process contains two steps: the DOR hearing and one appeal to the Warden. Following their DOR hearings, Rocha, Ibarra, Pifia, and Barrios exhausted the second (and final) step: they each submitted an appeal to Warden Valdez in which they raised their failure to protect claims. *See* Rocha Decl. ¶ 18; Ibarra Decl. ¶ 20; Pifia Decl. ¶¶ 8, 9; Barrios Decl. ¶¶ 8, 9. Valdez addressed those claims on the merits, but his remedy was too little and too late: refusing to dismiss the DORs, he merely downgraded

the infractions from Class A to Class C. This meant that these men would remain in segregation and, even more significantly, the DORs would remain on their records and thus negatively impact their applications for parole. *See* Defendant's Ex. 3 at 45 (Pifia appeal form); *id.* p. 55 (Rocha appeal form); *id.* p. 75 (Ibarra appeal form); *id.* p. 86 (Barrios appeal form). In denying Ibarra's appeal, the Warden expressly conceded that "you advised staff of your concerns." Nevertheless, Valdez upheld the DOR conviction. *See* Ibarra Decl. ¶ 22; Def. Ex. 3 at 75.

Disappointed with this result, Plaintiffs decided to contact Jeff Kirkman, an official with the IDOC's Virtual Prison, which oversees ICC, in an effort to pursue their failure to protect claims and seek dismissal of the DORs.<sup>3</sup> Included in Defendants' Exhibits are two sets of letters written to Kirkman. One set was written in November 2009 by Ibarra and Barrios. *See* Defs. Exh. 3 at pp. 69-72 (Ibarra letter) and pp. 83-84 (Barrios letter). Ibarra's five-page letter explains in detail how he informed three members of the ICC staff before the transfer that gang members in the West Wing would likely target him due to problems they had with his brother, and that it would be dangerous to transfer him. The letter accuses guards of deliberately placing him in a dangerous situation. The letter from Barrios informs Kirkman that Barrios had been living in the West Wing for a period of time, that he was doing well there, and "things were starting to come together," when suddenly he was assaulted through no fault of his own and was issued a DOR. Barrios asks Kirkman to investigate what happened and to remove the DOR from his record.

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<sup>3</sup> Contacting Kirkman was not required by the exhaustion process, and thus the Plaintiffs went beyond what was necessary to exhaust. Given that IDOC oversees ICC, Plaintiffs were hopeful that Kirkman might expunge their DORs.

The second set of letters were written to Kirkman in December 2009 and January 2010. *See* Defs. Ex. 3 at 46-47 (letter from Ibarra, Pifia, and Barrios) and p. 57 (Rocha letter). In their letters, plaintiffs once again notified Kirkman that they had been assaulted due to staff misconduct. *See, e.g.*, Defs. Ex. 3 at 49, Pifia Appeal ("The ICC Administration caused the assault to happen when they moved rival gang members together. They failed to protect me then punished me."); *id.* at 86 Barrios Appeal ("The administration forced rival gangs to live with each other and they knew or should have known there was going to be violence. I was punished for defending myself as a bystander and the DOR's still in my file.") These additional administrative efforts were unsuccessful, however, and all appeals were denied. *See* Rocha Decl. ¶ 21; Ibarra Decl. ¶¶ 25-26; Pifia Decl. ¶ 12; Barrios Decl. ¶ 10-11. This lawsuit was filed soon thereafter.

### **B. Argument**

For three separate reasons, Defendants' motion to dismiss the claims of the Chow Hall 5 on the ground that they failed to file Grievances should be rejected. These reasons are: (1) Plaintiffs exhausted the *DOR* Process; (2) the Grievance Process was not "available" to these men, as that term is employed in the PLRA; and (3) to whatever extent, if any, these prisoners were required to use the Grievance Process, they are entitled to an equitable excusal, given that ICC staff instructed them to use the *DOR* Process, and these men obeyed those instructions.

Before discussing these three arguments, several legal principles must be emphasized. The PLRA states that no action may be brought in federal court by a prisoner "until such administrative remedies as are available are exhausted." 42 U.S.C. § 1997e(a). A prisoner need not allege in his or her complaint that exhaustion has

occurred. Rather, failure to exhaust is an affirmative defense, and the defendant has the burden to plead it and to prove that exhaustion has not occurred. *See Jones v. Bock*, 549 U.S. 199, 216 (2007); *Brown v. Valoff*, 422 F.3d 926, 937 (9th Cir. 2005). When addressing a defendant's motion to dismiss for failure to exhaust, a court may look beyond the pleadings and decide disputed issues of fact. *See Wyatt v. Terhune*, 315 F.3d 1108, 1119-20 (9<sup>th</sup> Cir. 2003).

The Supreme Court has stated that "a prisoner must complete the administrative review process in accordance with the applicable procedural rules" as set by the facility. *Woodford v. Ngo*, 548 U.S. 81, 88 (2006). "[I]t is the prison's requirements, and not the PLRA, that define the boundaries of proper exhaustion." *Jones*, 549 U.S. at 218. Accordingly, we must look to the applicable ICC policies to determine which administrative process these plaintiffs were required to exhaust.

#### **1. Plaintiffs Exhausted The DOR Process**

There are two methods of administrative exhaustion at ICC, and each method applies in a different context. These methods are set forth in two Standard Operating Procedures ("SOPs"): the Grievance and Informal Resolution Procedure for Offenders ("Grievance Policy") (SOP 316.01.01.001)<sup>4</sup> and the Disciplinary Procedures: Offender ("Disciplinary Policy") (SOP 318.02.01.001).<sup>5</sup> The two policies do not overlap. The Grievance Policy states that a grievance is a "complaint regarding a problem or action"

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<sup>4</sup> For a copy of ICC's Grievance policy SOP 316.01.01.001--which is IDOC's policy--see Defendants' Exhibit 1, Attachment D. This policy also appears on IDOC's web site at <http://www.idoc.idaho.gov/policy/int3160201001.pdf>.

<sup>5</sup> The copy of the Disciplinary policy, SOP 318.02.01.001, submitted by Defendants in Exhibit 2, Attachment A is not IDOC's official policy but apparently is an earlier version of it. *See* <http://www.idoc.idaho.gov/policy/int3180201001.pdf>. The two differ in a few respects.

that affects a prisoner. SOP 316.01.01.001 at 3. The grievance policy contains a list of matters that cannot be grieved. The first item on the list is: "Disciplinary Offense Reports (DORs): DOR hearing process *including findings and sanctions. There is a separate process for the disciplinary procedure review or appeal process*, which can be found in SOP 318.02.01.001, Disciplinary Procedures." *See id.* at 3 (emphasis added).

Correspondingly, the SOP that sets forth the Disciplinary Procedures Process, SOP 318.02.01.001, states that prisoners "cannot use the [Grievance policy] for issues or concerns regarding the disciplinary system. *The [DOR] appeal process is the only method of administrative review for the disciplinary system.*" *See id.* at 31.<sup>6</sup> This policy creates a two-step process once a prisoner is issued a DOR: (1) the prisoner has an opportunity for a hearing before a Disciplinary Hearing Officer (DHO), who issues a decision, and (2) if the prisoner is found guilty, he may file an appeal to the facility head using the Disciplinary Appeal form. *Id.* at 30-31.

Both the Grievance Policy and the Disciplinary Policy make clear that once a prisoner receives a DOR, all matters arising from the incident that gave rise to the DOR must be raised as part of the DOR Process, and *not* the Grievance Process. These include "issues or concerns" arising from a DOR as well as the "findings" of the DHO. Indeed, Defendants have created a form used by ICC's Grievance Coordinator that codifies this distinction. This form, a copy of which is attached to the Grievance Policy (*see* Defendants' Exh. 1 at p. 38), contains a box that reads: "You cannot grieve a DOR, but must use the disciplinary appeal process."

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<sup>6</sup> This provision is contained in the *official* SOP available on line but is not in the version filed by Defendants with the Court. The version filed by Defendants, though, contains a similar pronouncement: "DORs may not be grieved." *See* Defs Exh. 2 p. 25.

Defendants contend that the Chow Hall 5 were required to exhaust the Grievance Process. That contention is erroneous. All five of these prisoners received DORs. Accordingly, under ICC's policies, they were required to exhaust the DOR Process, not the Grievance Process.

As explained in the Factual Background, prisoners Ibarra, Rocha, and Kelly complained administratively about the fact that (1) guards ignored their pleas for protection, (2) guards deliberately placed these men where they were likely to be attacked by members of a rival gang, and (3) as a result, they were assaulted. Similarly, bystanders Pifia and Barrios complained administratively about the fact that they were assaulted when guards made the completely reckless decision to move Ibarra, Rocha, and Kelly to the West Wing.

At first glance, it might appear that the Chow Hall 5 could have utilized the Grievance Process to pursue their administrative remedies because all five men had a "complaint" about their confinement. (Indeed, as explained later in this brief, ICC's policies are a trap for the unwary because they are not very precise.) However, a careful examination of Defendants' policies--and how ICC employees are implementing them--makes clear that the Chow Hall 5 only had one option: the DOR Process. This conclusion is mandated by the following six sets of facts:

1. The language of the policies themselves: The DOR and Grievance policies, as discussed above, create two administrative remedies, and they assign to the DOR Process all "issues or concerns" arising from a DOR. Both policies contain admonitions that the Grievance Process may not be used where the DOR Process has application. Therefore,

because the Chow Hall 5 had been issued DORs, the clear language of Defendants' policies required that these men raise all their issues within the DOR Process.

2. The statement of Officer Soto: As noted above, when the Chow Hall 5 asked Officer Soto for grievance forms so that they could complain about their having been placed in danger, Soto informed them that they had no option but to raise their complaint through the DOR Process.

3. The written advice of Case Manager Fink: As noted above, plaintiffs Kelly and Ibarra wanted to make certain that their complaints would be heard, and therefore in addition to proceeding with the DOR Process, they sent a Concern Form--the first step under the Grievance Process--to their Case Manager, Ms. Fink. Fink, like Soto, informed Kelly and Ibarra that they had no option but to raise their failure to protect claims as part of the DOR Process.

4. The written decisions of Chester Penn: As noted above, plaintiffs Ibarra and Rocha submitted written Grievances to ICC's Grievance Coordinator, Chester Penn, raising their failure to protect claims. *See* Defs' Ex. 1 at 45-46 (Ibarra Grievance), 49-50 (Rocha Grievance). Penn responded by placing an "X" in the box that reads: "You cannot grieve a DOR or the disciplinary process but instead must use the disciplinary appeal process." *See* Defs' Ex. 1 at 47 (Penn Response to Ibarra), 51 (Penn Response to Rocha). Thus, Penn refused to allow these men to raise their failure to protect claims in any forum other than the DOR Process.

5. The actions of Warden Valdez: The Chow Hall 5 obeyed the instructions of Soto, Fink, and Penn and included their failure to protect complaints in their disciplinary appeals to Warden Valdez. Significantly, *Valdez addressed those complaints on the*

*merits*. Valdez concedes in his response to Ibarra's appeal, for instance, that Ibarra had "advised staff of [his] concerns." Valdez then reduces Ibarra's offense from a Class A to a Class C infraction. *See* Defs' Ex. 2 at 75. Valdez did the same with the appeals of Piña, *see id.* at 45, Rocha, *see id.* at 55, and Barrios, *see id.* at 86. Notably, Valdez did *not* tell these men that their failure to protect issue had to be raised through the Grievance Process; instead, he addressed and resolved (albeit inadequately) that issue by reducing the severity of the infraction.

6. The experience of Vernon Peterson: ICC prisoner Vernon Peterson was issued a DOR in June 2007 (more than two years before the Chow Hall 5 incident). Like the Chow Hall 5 prisoners, Peterson wanted to complain about the fact that guards had refused to protect him and, as a result, he was assaulted and was then issued a DOR when he tried to ward off the attack. Peterson opted to raise his failure to protect claim through the Grievance Process. However, Peterson received the same response that the Chow Hall 5 received two years later: Peterson was told by the Grievance Coordinator that he needed to pursue this complaint through the DOR Process, not the Grievance Process. *See* Peterson Decl., Exs. 1 and 2.

It is unclear why Defendants claim in their brief that prisoners with DORs must raise failure to protect claims through the Grievance Process when for at least the past three years it has been the consistent practice of ICC employees to require that those claims be raised through the DOR Process. In any event, the Chow Hall 5 did as they were instructed to do by three different staff, including Chester Penn, and completed the DOR Process. They verbally raised their claims with the DHO and they appealed the denial of those claims to Warden Valdez. Valdez addressed those claims on the merits,

granting partial (and largely ineffective) relief. Plaintiffs then took the extra step of raising their claims with IDOC (through Jeff Kirkman) but to no avail.

In sum, Defendants' policies required the Chow Hall 5 to exhaust their administrative remedies through the DOR Process (and not the Grievance Process). Plaintiffs did so. Plaintiffs satisfied the purpose of the exhaustion requirement, which the Supreme Court has stated is to afford "corrections officials time and opportunity to address complaints internally before allowing the initiation of a federal case." *Porter v. Nussle*, 534 U.S. 516, 525 (2002). Accordingly, Defendants' Motion to Dismiss based on the fact that the Chow Hall 5 did not pursue claims through the Grievance Process should be denied.

## **2. The Grievance Process Was Not "Available" To The Plaintiffs**

The PLRA states that no action shall be brought in federal court by a prisoner "until such administrative remedies *as are available* are exhausted." 42 U.S.C. § 1997e(a) (emphasis added). Defendants have the burden of proving availability, as with all other aspects of their affirmative defense of failure to exhaust. *See Brown v. Valoff*, 422 F.3d 926, 936 (9<sup>th</sup> Cir. 2005) (holding that because exhaustion is an affirmative defense, "a defendant must demonstrate that pertinent [administrative] relief remained available.").

The Ninth Circuit has explained that "to be 'available,' a remedy must be 'capable of use for the accomplishment of [its] purpose.' Remedies that rational inmates cannot be expected to use are not capable of accomplishing their purposes and so are not available." *Nuñez v. Duncan*, 591 F.3d 1217, 1224 (9<sup>th</sup> Cir. 2010) (quoting *Turner v. Burnside*, 541 F.3d 1077, 1084 (11th Cir. 2008)). Here, the Chow Hall 5 were informed by ICC staff that the Grievance Process was unavailable to address their failure to protect claims and

that they had to pursue their remedies through the DOR Process. Plaintiffs received this information orally (Officer Soto) as well as in writing (Chester Penn and Ms. Fink).

It is therefore impossible for Defendants to uphold their burden to prove that the Grievance Process was "available." Two recent decisions from the Ninth Circuit make this clear. In *Brown v. Valoff*, 422 F.3d 926 (9th Cir. 2005), a case involving facts similar to those here, the court held that prisoners are not required to exhaust an administrative process once they have "been reliably informed by an administrator that no remedies are available" through that process. *Brown*, 422 F.3d at 935. As the court noted in *Brown*, the Third Circuit has decided similarly, holding that "if prison officials inform the prisoner that he cannot file a grievance, the formal grievance proceeding was never 'available' . . . within the meaning of 42 U.S.C. § 1997e." *Brown*, at 937 (quoting *Brown v. Croak*, 312 F.3d 109, 113 (3d Cir. 2002)). A similar conclusion was reached by the Ninth Circuit in *Nunez*, 591 F.3d at 1225-26 (holding that where a prisoner was erroneously instructed by prison officials to follow a particular administrative process, then an alternative process was not actually "available" to him) *see also Dole v. Chandler*, 438 F.3d 804, 813 (7th Cir. 2006).

"[I]nformation provided the prisoner is pertinent because it informs our determination of whether relief was, as a practical matter, 'available.'" *Brown v. Valoff*, 422 F.3d at 937. Here, *all* of the information provided to the Chow Hall 5 instructed them to use the DOR Process and not the Grievance Process, and ICC's written policies do not permit prisoners with DORs to raise their issues through the Grievance Process. Thus, the Grievance Process was not "available" to these prisoners within the meaning of the PLRA, and Defendants' Motion to Dismiss should be denied on this basis, as well.

**3. Even If The Grievance Process Was "Available" To The Plaintiffs, They Should Be Excused For Not Having Used It**

There is a third reason why Defendants' Motion to Dismiss on the ground that Plaintiffs did not file Grievances should be denied. Even assuming *arguendo* that ICC's exhaustion policy required Plaintiffs to pursue the Grievance Process (which it did not), and that this process was "available" to them within the meaning of the PLRA (which it was not), the fact remains that these men acted in good faith in pursuing the DOR Process and, moreover, they *did* present their complaints to the administration. Therefore, under the standard employed by the Ninth Circuit in *Nuñez v. Duncan*, 591 F.3d 1217 (9th Cir. 2010), and cases cited therein, Plaintiffs should be excused from not using the Grievance Process because they took steps that they believed reasonably and in good faith would properly exhaust their claims.

In *Nuñez*, the Ninth Circuit held that a prisoner's failure to exhaust his administrative remedies was excused because he took "reasonable and appropriate steps" to exhaust them but was thwarted by prison staff. *Id.* at 1221. The facts showed that the prisoner believed "in good faith" that he was utilizing the correct procedure, only to learn later that a prison official had given him erroneous information. *Id.* at 1226. As a matter of equity, the court held, the prisoner would be excused from strict compliance with the exhaustion requirement. Even the judge who dissented in *Nuñez* agreed that a prisoner should be excused from compliance with a grievance process where "prison officials have effectively prevented a prisoner from using the available procedures, for example by literally denying the prisoner access to the process, [or] *falsely claiming that the prisoner could not use the process.*" *Id.* at 1229 (Ikuta, J., dissenting, emphasis added); *accord: Johnson v. Testman*, 380 F.3d 691, 697 (2d Cir. 2004) (remanding an exhaustion issue to

determine whether the prison's grievance policy was "sufficiently confusing so that a prisoner . . . might reasonably have believed that he could raise his claim against [the defendant] as part of his defense in disciplinary proceedings."); *Giano v. Goord*, 380 F.3d 670, 673-74 (2d Cir. 2004) (holding that a prisoner should be excused from complying with a prison's grievance process where the process was unclear as to his choices).

Here, then, even if the Grievance Process was the process that should have and could have been used, the Court should nevertheless find that the Chow Hall 5 are excused from using it because they reasonably and in good faith believed--based on the instructions of several prison officials--that they were required to raise their failure to protect claims via the DOR Process. This conclusion is particularly appropriate because these men actually presented their claims to prison administrators--including the Warden--and thus satisfied the purpose of the exhaustion requirement. In *Porter v. Nussle*, 534 U.S. 516 (2002), the Supreme Court stated:

Beyond doubt, Congress enacted § 1997e(a) to reduce the quantity and improve the quality of prisoner suits; to this purpose, Congress afforded corrections officials time and opportunity to address complaints internally before allowing the initiation of a federal case.

*Id.* 534 U.S. at 524-25. *See also Nuñez*, 591 F.3d at 1223 (noting that the purpose of the PLRA's exhaustion requirement is to provide notice of a claim to prison officials so that they have a chance to avoid litigation, thus enhancing efficiency and reducing costs).

The Chow Hall 5 gave prison officials actual notice of their claims, and those officials (including the Warden) addressed those claims, albeit ineffectively. It would therefore be inequitable to dismiss the claims of these prisoners when they tried to do the right thing, they were thwarted by prison staff, and they did in fact give prison officials

both the time and the opportunity to respond appropriately to their complaints. Accordingly, Defendants' Motion to Dismiss should be denied on this basis, too.

### **III. PLAINTIFF ENZMINGER ADEQUATELY EXHAUSTED HIS 2010 CLAIM**

Defendants' third argument seeks to dismiss prisoner Randy Enzminger as a named plaintiff. According to Defendants, Enzminger is not eligible to act as a named plaintiff because he failed to exhaust his administrative remedies. Defendants are wrong.

Enzminger has been assaulted three times at ICC due to Defendants' deliberate indifference, twice in 2009 and once in 2010. *See* SAC ¶¶ 145-170. Enzminger was not included as a named plaintiff when Riggs filed his Amended Complaint in March 11, 2010; however, the Amended Complaint lists Enzminger as a victim and details his first two assaults. Three days after the Amended Complaint was filed, Enzminger was assaulted for the third time. *See* SAC ¶ 168. Enzminger then fully complied with all three steps of ICC's Grievance Process with regard to the third assault, completing that process prior to the filing of the SAC on June 30, 2010. Enzminger was added as a named plaintiff in the SAC, given that he had properly exhausted the new assault.

Defendants devote 95 percent of this section of their brief discussing the two assaults that occurred in 2009, which Defendants contend Enzminger failed to exhaust. Defendants' brief only refers to the 2010 assault in a footnote. *See* Defs' Mem. at 10 n.2.

Defendants' argument is misdirected. Enzminger qualifies as a named plaintiff based on his March 14, 2010 assault, which he did fully grieve. This third assault was particularly violent and severe. As noted in Defendants' exhibits, Enzminger's nose was broken and his face so deeply lacerated that stitches were required to close the wounds. *See* Defs' Ex. 1 at 64.

Defendants have filed with the Court the relevant documents proving that Enzminger completed all three steps of the Grievance Process. *See* Defs' Ex. 1 at 63-68. As shown on page 63, Enzminger submitted a timely Concern Form (the first step of the process) to ICC's Investigator, Brent Archibald. Enzminger asks Archibald: "What's the reason you have failed your duty to properly investigate this felonious assault and battery as required?"<sup>7</sup> For Enzminger--who had now been assaulted for the third time--this question is exceedingly important and urgent. Unless aggressive steps are quickly taken by ICC, Enzminger must assume that a fourth assault is likely.

The response that Enzminger received was not satisfactory. In the first place, Archibald *at no point* informs Enzminger what ICC is doing (if anything) to investigate this assault. Enzminger is told only that Ada County was contacted and had declined to file felony charges. Surely Enzminger had a right to question how aggressively ICC pressed his case with Ada County. After all, this was the third assault, Enzminger's nose had been broken and his face deeply lacerated by a group of attackers, and felony assault charges surely were appropriate. Enzminger therefore proceeded to the second step of the process by submitting a Grievance, in which he requested, among other things, "\$10 million for damages for refusal to protect."<sup>8</sup> Enzminger's Grievance states that as a result of Defendants' failure to protect him (once again), his nose was broken and he needed

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<sup>7</sup> Enzminger's complaint thus raises an issue expressly included in the SAC. The SAC alleges that Defendants are guilty of a "failure to adequately investigate acts of violence." *See* SAC ¶ 9. The SAC accuses Defendants of failing to ensure "that prisoner assaults will be adequately investigated in order to determine what steps should be undertaken to prevent future assaults." *Id.* ¶28. Indeed, the SAC alleges that Defendants have failed to adequately investigate each and every assault detailed in the SAC, including Enzminger's three assaults. *See, e.g.* ¶¶ 75; 116; 132; 164; 208; 223; 239; 268.

<sup>8</sup> Clearly, then, Enzminger raised a failure to protect claim through the Grievance Process.

stitches to his face. *See* Defs' Ex. 1 at 64. Yet Enzminger's request for a remedy, including monetary relief, was denied. *See id.* at 65.

Enzminger then exhausted the final step in the Grievance Process by filing an appeal. *See id.* p. 66. In his appeal, Enzminger reiterated his concern that ICC was not doing enough to deter dangerous assaults. Enzminger wrote as his "Problem": "Failure to report felony crimes to the Ada County Sheriff's Office and permit them to interview me in order to allow proper police procedures to be done."<sup>9</sup> Enzminger's appeal, however, was denied. *See id.* pp. 65-66.

Thus, Plaintiff Enzminger adequately and properly exhausted all three steps in ICC's Grievance Process. Enzminger placed defendants on notice of his claims, giving officials "time and opportunity to address [his complaints] internally before allowing the initiation of a federal case." *Porter v. Nussle*, 534 U.S. at 525; *see also Nuñez*, 91 F.3d at 1223. There were no additional steps Enzminger could take to exhaust his claims administratively. Therefore, his claims are properly before the Court in this litigation.

#### **IV. PLAINTIFF IBARRA MAY CONTINUE TO REPRESENT THE CLASS**

Defendants' fourth contention--that Andrew Ibarra lacks standing and should be dismissed from this case--is based on the fact that Ibarra was recently released on parole and no longer resides at ICC. From this fact, Defendants make two assertions, the first of which is true and the second of which is false. It is true that Ibarra's release moots his

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<sup>9</sup> Enzminger's appeal raises a critical issue expressly included in the instant lawsuit. The SAC alleges that ICC "has a policy and practice of refusing to refer for prosecution the perpetrators of prisoner assaults, except in very rare situations. This policy and practice is motivated by a desire to conceal the carnage that is occurring at ICC. This policy and practice encourages violent prisoners to assault other prisoners because they know they can do so with relative impunity." *See* SAC ¶ 31. As Enzminger knows from personal experience, until ICC takes a more punitive approach to assaultive behavior, continued violence can be expected. Enzminger's appeal raises this issue.

*individual* claims for declaratory and injunctive relief. *See* Defs' Mem. at 10. But it is false that Ibarra's release destroys his standing to represent the class.

The Supreme Court has squarely held that once suit is filed as a putative class action seeking systemic injunctive relief (as here), a named plaintiff may continue to represent the class even after his or her individual claim has become moot. *See Sosna v. Iowa*, 419 U.S. 393, 399, 401-02 (1975); *U.S. Parole Comm'n v. Geraghty*, 445 U.S. 388, 404-405 n. 11 (1980); *Gerstein v. Pugh*, 420 U.S. 103 (1975). This is known as the "capable of repetition, yet evading review" exception to the mootness doctrine. This exception was created in order to prevent illegal conduct from evading judicial scrutiny.

The "capable of repetition" exception has particular application to prisoner litigation because--as Ibarra's situation illustrates--prisoners may be incarcerated one day and released the next.<sup>10</sup> Therefore, unless prisoners are permitted to remain as class representatives even after their individual claims have become moot, illegal conduct by prison officials may evade judicial scrutiny.

The Supreme Court and the Ninth Circuit have repeatedly applied the "capable of repetition" exception in prison litigation. All that needs be shown for a plaintiff to continue to represent the class is proof that at the time suit was filed, the plaintiff had a personal stake in the outcome of the case and the prerequisites of Rule 23 are satisfied. If the class is then certified after the named plaintiff's claims have become moot, then class certification is granted "relat[ing] back" to the filing of the complaint, at a time when the plaintiff's claims were not moot. *See Geraghty*, 445 U.S. at 404-05 n.11; *Sosna*, 419 U.S.

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<sup>10</sup> In fact, a second named plaintiff, Ray Barrios, recently was transferred from ICC and is now in a different facility. However, for the reasons explained here, Barrios, like Ibarra, continues to have standing to represent the class.

at 402 n.11; *Inmates of San Diego County Jail in Cell Block 3B v. Duffy*, 528 F.2d 954, 956 (9th Cir. 1975) (noting that the "capable of repetition" exception is applicable in prison litigation because otherwise a case seeking injunctive relief could become moot "before the District Court could have reasonably been expected to rule on a class certification motion"); *Gluth v. Kangas*, 951 F.2d 1504, 1509 (9th Cir. 1991); *Wade v. Kirkland*, 118 F. 3d 667, 669-79 (9th Cir. 1997) (remanding case that dismissed a putative class action on grounds of mootness because district court neglected to make findings as to whether plaintiff's claims were capable of repetition). *See also McKenzie v. Crotty*, 738 F. Supp. 1287, 1290 (D.S.D. 1990) (holding that a prisoner released from jail one day after his class action lawsuit was filed continued to have standing to represent the class, even though his individual claim for injunctive relief was now moot).

Notably, Defendants do not cite any of these cases or discuss this principle of law. Instead, they cite *non-class action* cases in which a prisoner's release mooted his or her claim for injunctive relief. *See, e.g., Dilley v. Gunn*, 64 F.3d 1365, 1368 (9<sup>th</sup> Cir. 1995) (holding that plaintiff's request for injunctive relief seeking access to the prison's law library became moot when he was transferred to another prison). All of those cases are inapposite. Indeed, in one of the cases cited by Defendants, *Preiser v. Newkirk*, 422 U.S. 395 (1975), Justice Marshall notes in his concurring opinion that the plaintiff's claims would not have been moot if the lawsuit had been brought as a class action. *See Preiser*, 422 U.S. at 404 (Marshall, J., concurring).

Defendants cite no case on point, and the law is squarely against them. Plaintiff Ibarra should be permitted to remain as a representative of the putative class notwithstanding the mootness of his individual claims. At some point, just as this Court

did in the *Balla* case, it may be appropriate to substitute new prisoners for Ibarra, but he certainly has standing to represent the class until then. *See Balla*, Order of December 18, 2007, Docket No. 724 at 11 (appointing four new class representatives to substitute for prisoners who had been released).

**CONCLUSION**

For the reasons stated above, Defendants' Motion to Dismiss should be denied.

Respectfully submitted this 23<sup>rd</sup> day of July, 2010.



Stephen L. Pevar

Lea C. Cooper

James D. Huegli

Attorneys for the Plaintiffs

**CERTIFICATE OF SERVICE**

I hereby certify that on July 23, 2010, I electronically filed the foregoing Memorandum with the Clerk of Court using the CM/ECF system which sent a notice of electronic filing to the following persons:

Kirtlan Naylor	<a href="mailto:kirt@naylorhales.com">kirt@naylorhales.com</a>
James Stoll	<a href="mailto:jrs@naylorhales.com">jrs@naylorhales.com</a>
Lea Cooper	<a href="mailto:Lcooper@acluidaho.org">Lcooper@acluidaho.org</a>
James Huegli	<a href="mailto:jameshuegli@yahoo.com">jameshuegli@yahoo.com</a>
Daniel Struck	<a href="mailto:dstruck@ishfirm.com">dstruck@ishfirm.com</a>
Gary Burger	<a href="mailto:gburger@ishfirm.com">gburger@ishfirm.com</a>



Stephen L. Pevar