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IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF IDAHO

MARLIN RIGGS, et al,	)	Case No. 1:09-cv-00010-BLW
	)	
Plaintiffs,	)	PLAINTIFFS' BRIEF IN SUPPORT
	)	
vs.	)	OF MOTIONS FOR PRELIMINARY
	)	
PHILIP VALDEZ, et al,	)	INJUNCTION AND PARTIAL
	)	
Defendants.	)	SUMMARY JUDGMENT

**INTRODUCTION**

Fourteen policies and practices of the Idaho Correctional Center (ICC) are challenged on Eighth Amendment grounds in Plaintiffs' Second Amended

Complaint (Dkt. 71).<sup>1</sup> Two of them are addressed in the instant motion. These policies and practices were selected for prompt resolution--even prior to the completion of discovery--for three reasons.

First, both are causing irreparable harm. Second, the existence of these policies and practices is uncontroverted; Defendants' own documents confirm their existence and their ongoing application. Third, the law is clear regarding both of them.

Due to the fact that these policies and practices are causing irreparable harm, Plaintiffs respectfully request the issuance of preliminary injunctive relief. However, because the facts are not in material dispute, the Court may grant summary judgment and permanent injunctive relief instead.

#### **SUMMARY OF ARGUMENT**

Issue Number One: The "Wrong Cell Door" Issue: Defendants concede that during the past seventeen months, there have been at least thirteen assaults--approximately one every six weeks--in which prisoners were seriously injured (and two were hospitalized) when guards mistakenly opened the wrong cell doors and permitted predatory prisoners to attack other prisoners. Defendants also concede that other cell doors were wrongly opened by staff during those seventeen months, each one of which was equally as life-threatening, but which did not result in assaults. For reasons explained below, these "longstanding, pervasive, [and] well-documented" incidents of staff error reflect a

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<sup>1</sup>The fourteen policies and practices challenged in this lawsuit are listed in a previously filed memorandum. See Plaintiffs' Brief In Support of Renewed Motion For Class Certification (Dkt. 94) at 6-12.

deliberate indifference for prisoner safety that violates the Eighth Amendment. See *Farmer v. Brennan*, 511 U.S. 825, 842 (1994). The very first error should have prompted a careful investigation and the implementation of an effective remedy to prevent the subsequent assaults. See *Robinson v. Prunty*, 249 F.3d 862, 866-67 (9<sup>th</sup> Cir. 2001) (holding that the failure of prison administrators to respond effectively to a series of assaults evidences deliberate indifference). Defendants' inadequate response to repeated and ongoing staff errors at ICC that keep causing injuries to prisoners violates the Eighth Amendment.

Issue Number 2: The "DORs to Victims" Issue: Defendants have a policy, practice, and custom of issuing Disciplinary Offense Reports (DORs) to the *victims* of an assault for merely engaging in self-defense. For example, in most of the thirteen "wrong cell door" assaults just mentioned, the victim was attacked by multiple assailants and was seriously injured, and yet guards issued a DOR to the injured victim, accusing *him* of "battery" or "mutual combat." Under Defendants' policy, even prisoners who throw one punch in self-defense when blind-sided by numerous assailants will typically receive a DOR. In 2009, an ICC prison official explained this policy as follows: "You are allowed to deflect punches and take action to avoid getting hit; however, once you throw a punch, it becomes mutual combat."<sup>2</sup> For reasons discussed below, administratively punishing the victim of an unprovoked assault for trying to ward off his assailants violates the Eighth Amendment, given that (1) there is absolutely no penological justification for this punishment, and (2) the punishment imposed for these DORs

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<sup>2</sup> See Plaintiffs' Exhibit 8.

is usually severe, including prolonged placement in segregation (with its attendant loss of out-of-cell time, significantly decreased access to education and rehabilitative programs, and reductions in recreation, visitation, commissary, and telephone privileges), and for those prisoners eligible for parole, a likely forfeiture of parole opportunity.

### **I. THE SCOPE OF THE EIGHTH AMENDMENT PROTECTION**

Plaintiffs seek relief under the Eighth Amendment. The Eighth Amendment, which applies to the states through the Fourteenth Amendment, see *Robinson v. California*, 370 U.S. 660, 666 (1962), prohibits the infliction of "cruel and unusual punishments." The Eighth Amendment is a prisoner's safety net. "[I]t is now settled that 'the treatment a prisoner receives in prison and the conditions under which he is confined are subject to scrutiny under the Eighth Amendment.'" *Farmer*, 511 U.S. at 832, quoting *Helling v. McKinney*, 509 U.S. 25, 31 (1993).

Inmates are sentenced to prison *as* punishment, not *for* punishment, and it is the Eighth Amendment that protects against the latter. The Eighth Amendment imposes on prison officials a duty to "provide humane conditions of confinement; prison officials must ensure that inmates receive adequate food, clothing, shelter, and medical care and must 'take reasonable measures to guarantee the safety of the inmates.'" *Farmer*, 511 U.S. at 832, quoting *Hudson v. Palmer*, 468 U.S. 517, 526-27 (1984).

Prisoners lose many rights as a consequence of their incarceration, but they retain an Eighth Amendment right to be protected from bodily injury inflicted

by other prisoners. As the Ninth Circuit recognized nearly three decades ago, "[p]rison officials have a duty to take reasonable steps to protect inmates from physical abuse." *Hoptowit v. Ray*, 682 F.2d 1237, 1250 (9<sup>th</sup> Cir. 1982). "Suffering physical assaults while in prison is not 'part of the penalty that criminal offenders pay for their offenses against society.' *Rhodes v. Chapman*, 452 U.S. 337, 347 (1981)." *Benefield v. McDowall*, 241 F.3d 1267, 1271 (10<sup>th</sup> Cir. 2001).

However, "[i]t is not . . . every injury suffered by one prisoner at the hands of another that translates into constitutional liability for prison officials responsible for the victim's safety." *Farmer*, at 834. In order to prove an Eighth Amendment violation, a prisoner must satisfy a two-part test, one part of which is objective, the other subjective. First, the plaintiff must demonstrate that he or she is "incarcerated under conditions posing a substantial risk of serious harm." *Id.* at 834. Second, the plaintiff must show that the defendant prison official had a sufficiently culpable state of mind. *Id.* See *Clouthier v. County of Contra Costa*, 591 F.3d 1232, 1243 (9<sup>th</sup> Cir. 2009); *Hearns v. Terhune*, 413 F.3d 1036, 1040 (9<sup>th</sup> Cir. 2005). See also *Skinner v. Uphoff*, 234 F. Supp.2d 1208, 1213-14 (D. Wyo. 2002) (discussing the Eighth Amendment standard in a failure to protect case similar to the instant case). These components are discussed below.

#### **1. The objective component**

A prisoner alleging a violation of the Eighth Amendment must show from objective facts that a condition of confinement creates "a substantial risk of serious harm." *Farmer*, at 834. The condition must be one that "is sure or very

likely to cause" serious injury. *Helling*, 509 U.S. at 33. See *Clouthier*, 591 F.3d at 1242.

## **2. The subjective component**

Next, an Eighth Amendment plaintiff must prove that the defendant official had a culpable state of mind, known as "deliberate indifference." The deliberate indifference standard is a middle ground that lies "somewhere between the poles of negligence at one end and purpose or knowledge at the other." *Farmer*, at 836. This standard is akin to criminal recklessness, which makes persons liable when they "consciously disregard[] a substantial risk of serious harm." *Id.*, at 837-38. Proving deliberate indifference is an issue of fact that can be demonstrated through both direct and circumstantial evidence:

Whether a prison official had the requisite knowledge of a substantial risk is a question of fact subject to demonstration in the usual ways, including inference from circumstantial evidence, and a factfinder may conclude that a prison official knew of a substantial risk from the very fact that the risk was obvious.

*Id.*, at 842.

A prison official who "knows of and disregards an excessive risk to inmate health or safety" is deliberately indifferent. *Id.* at 837. See *Clouthier*, 591 F.3d at 1245 (holding that a guard who ignored signs that a prisoner was suicidal exhibited deliberate indifference). A prisoner need not wrest an admission from the defendant that he or she was aware of the risk, but need only show that the risk was so obvious the defendant "must have known" about it. *Id.* at 842. In failure to protect cases, constructive knowledge can be demonstrated by "showing that a substantial risk of inmate attacks was longstanding, pervasive,

well-documented, or expressly noted by prison officials in the past, and the circumstances suggest that the defendant-official being sued had been exposed to information concerning the risk." *Id.* See also *Hearns v. Terhune*, 413 F.3d 1036, 1041-42 (9<sup>th</sup> Cir. 2005).

Once an official is "exposed to information concerning the risk," the official may not turn a blind eye to it. On the contrary, either the risk must be abated or, if the official is uncertain as to its depth or degree, an investigation must ensue. See *Farmer*, at 842 n.8 ("[An official] would not escape liability if the evidence showed that he merely refused to verify underlying facts that he strongly suspected to be true, or declined to confirm inferences that he strongly suspected to exist.") See also *Clouthier*, 591 F.3d at 1245.

An Eighth Amendment plaintiff need only show that the risk of injury was obvious, and need not show that the defendant wanted the plaintiff to be injured by the dangerous condition. "[A] prison official [may not] 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." *Farmer*, at 843. Similarly, a prison condition that could precipitate prisoner violence may be challenged by any prisoner subject to it. A prisoner "does not need to wait until he is actually assaulted before obtaining relief." *Ramos v. Lamm*, 639 F.2d 559, 572 (10<sup>th</sup> Cir. 1980). See also *Farmer*, at 843.

## II. SUPERVISORY LIABILITY

Plaintiffs seek to halt two longstanding policies and practices at ICC. In order to qualify for that relief, Plaintiffs have the burden of proving that at least one of the named Defendants is responsible for those policies and practices. Here, that person is the Warden of ICC.

It is well settled that when a supervisor creates a "policy or custom" which is then implemented by a subordinate to the derogation of a plaintiff's federal rights, the supervisor may be held liable for that action under 42 U.S.C. § 1983. Liability in that instance is not based on *respondeat superior* but, rather, on the supervisor's own actions in creating the policy or custom in the first instance.

The Ninth Circuit adopted this "doctrine" of supervisory liability in *Johnson v. Duffy*, 588 F.2d 740 (9th Cir. 1978). The court explained in *Johnson* that "personal participation is not the only predicate for section 1983 liability. Anyone who 'causes' any citizen to be subjected to a constitutional deprivation is also liable." *Id.*, 588 F.2d at 743. A supervisor may cause a constitutional deprivation by "setting in motion a series of acts by others which the actor knows or reasonably should know would cause others to inflict constitutional injury." *Id.*, 588 F.2d at 744. Subsequent Ninth Circuit cases have applied this doctrine. See *Gomez v. Vernon*, 255 F.3d 1118, 1126-31 (9<sup>th</sup> Cir.), *cert. denied*, 534 U.S. 1066 (2001) (discussing the doctrine, and finding Idaho prison administrators supervisorily liable for permitting subordinates to pursue an unconstitutional practice); *Larez v. City of Los Angeles*, 946 F.2d 630, 646 (9th Cir. 1991); *Redman v. County of San Diego*, 942 F.2d 1435, 1446 (9th Cir. 1991) (*en banc*),

*cert. denied*, 502 U.S. 1074 (1992); *McRorie v. Shimoda*, 795 F.2d 780, 783-84 (9th Cir. 1985).

Supervisory liability may be proven in one of three ways:

Supervisory liability is imposed against a supervisory official in his individual capacity for his "own culpable action or inaction in the training, supervision, or control of his subordinates;" for his "acquiesce[nce] in the constitutional deprivations of which [the] complaint is made;" or for conduct that showed a "reckless or callous indifference to the rights of others."

*Larez*, 946 F.2d at 646 (internal citations omitted). See also *Gomez*, 255 F.3d at 1126-27 (employing the *Larez* test). Thus, a supervisor may be held liable under Section 1983 for failing to adequately train or supervise subordinates, for acquiescing in their misconduct by failing to correct or abate it, or for demonstrating reckless or callous indifference. See also *Berry v. City of Muskogee*, 900 F.2d 1489, 1499 (10th Cir. 1990) (holding that jail supervisors who were aware of their subordinates' practice of permitting violent prisoners to mingle with vulnerable prisoners were liable for that practice); *Lopez v. LeMaster*, 172 F.3d 756, 761-62 (10<sup>th</sup> Cir. 1999) (holding that where a prior assault placed a sheriff on notice of a dangerous condition in his jail, he can be presumed deliberately indifferent if he fails to fix it and it then injures another prisoner).

One of the original Defendants in this litigation is Phillip Valdez, the Warden of ICC at the time suit was filed. Three days after suit was filed, Corrections Corporation of America (CCA) replaced Valdez with Warden Wengler, who still holds that post. Valdez was sued in his official capacity. Therefore, by operation of Rule 25(d)(1) F.R.Civ.P., Wengler has been

automatically substituted for Valdez. See *Kentucky v. Graham*, 473 U.S. 159, 166 n.11 (1985).

The two policies and practices at issue here--the "wrong cell door" and the "DORs to victims" policies and practices--are attributable to the Warden of ICC. As explained below, Valdez created them and Wengler continues to implement them. The fact that ICC replaced its warden makes no difference regarding the injunctive relief being sought. See *Hoptowit v. Spellman*, 753 F.2d 779, 781-82 (9th Cir. 1985) (holding that where, as here, prisoners seek injunctive relief to halt ongoing policies and practices of a prison, a change in prison personnel does not impact the court's ability to grant such relief).

One point deserves particular emphasis, given the facts of this case. As previously noted, a supervisor is not permitted to turn a blind eye to errors committed by a subordinate. Failure to correct a subordinate's error constitutes acquiescence, and the supervisor is as culpable for it as if he or she had instructed the subordinate to engage in that misconduct. A supervisor who learns about an error committed by a subordinate must do one of two things: either promptly devise and implement a reasonable remedy or, if the supervisor is uncertain as to what is the precise problem or how to fix it, then commission an adequate investigation to determine what remedial action is necessary.

The Ninth Circuit has repeatedly found supervisory liability when a supervisor was placed on notice that errors were being committed by subordinates and the supervisor failed to conduct an adequate investigation. See *Gomez v. Vernon*, 255 F.3d at 1127 (finding supervisory liability where

prison administrators took a "turn-a-blind-eye approach" and failed to adequately investigate prisoner complaints of retaliation by staff); *Henry v. County of Shasta*, 132 F.3d 512, 518 (9th Cir. 1997), *modified*, 137 F.2d 1372 (9th Cir.), *cert. denied*, 525 U.S. 819 (1998) ("a rational fact finder may properly infer the existence of a previous policy or custom of deliberate indifference" where county supervisors persistently ignored allegations that subordinates were engaging in misconduct); *Neely v. Feinstein*, 50 F.3d 1502, 1511 (9th Cir. 1995) (holding that a supervisor must "conduct a thorough investigation and draw a reasoned conclusion" when informed about potential staff error); *Fuller v. City of Oakland*, 47 F.3d 1522, 1528-29 (9th Cir. 1995) (holding that a supervisor had an obligation to investigate allegations of sexual harassment and to take "prompt, effective action" to prevent recurrence); *Larez*, 946 F.2d at 647 (affirming supervisory liability based on a police chief's failure to adequately investigate citizen complaints of excessive force committed by subordinates); *see also Skinner v. Uphoff*, 234 F. Supp.2d at 1214 (holding that prison supervisors have an Eighth Amendment duty *every time* a prisoner is assaulted to conduct "an investigation to uncover the existence of staff error or wrongdoing.")

If the supervisor's investigation uncovers a deficiency, the supervisor then has a duty to address it effectively. *See Gomez*, 255 F.3d at 1127. This is particularly true when prisoner safety is at stake and serious injury may result from inaction. As the Tenth Circuit recently noted, as soon as prison officials are placed on notice that a prison condition threatens the safety of a prisoner, "they ha[ve] a constitutional duty to consider all reasonable means of protecting [him]."

*Howard v. Waide*, 534 F.3d 1227, 1240 (10<sup>th</sup> Cir. 2008). See also *Tafoya v. Salazar*, 516 F.3d 912, 918 (10<sup>th</sup> Cir. 2008).

We now turn to a detailed examination of the two policies and practices at issue here. As will be seen, both of them violate the Eighth Amendment, and ICC should be immediately enjoined from any further enforcement of them.

### **III. DEFENDANTS' "WRONG CELL DOOR" PRACTICE VIOLATES THE EIGHTH AMENDMENT**

#### **A. Statement of Facts**

1. Plaintiffs' Amended Complaint (Dkt. 16), filed March 11, 2010, alleges that the Warden of ICC, Phillip Valdez, was ignoring his duty to halt the frequent assaults that were occurring "when guards either mistakenly or deliberately opened the wrong doors, allowing prisoners to assault other prisoners." See *id.* at ¶¶ 31, 479. Plaintiffs' Second Amended Complaint (Dkt. 71) reiterates those allegations. See *id.* at ¶¶ 28, 483.
2. Most prisoners at ICC are confined in general population housing units. A wrongful cell door opening is unlikely to cause an assault in one of these units because prisoners are allowed to mingle anyway. In July 2009, however, several housing units at ICC were opened for occupancy and set aside for violent, disciplinary, or otherwise problem prisoners, including known members of gangs. In these units, prisoners are generally confined in their cells most of the day and are allowed out of their cells in a highly regulated and scheduled manner. A wrongful cell door opening in one of these units can lead (and has led) to violence. When a cell door is opened ("popped") it

makes an audible sound. See Declaration of Michael Miera at ¶¶9. A prisoner in the dayroom, for instance, could then attack a prisoner whose cell door was popped, or the prisoner in the cell could attack the prisoner in the dayroom.

3. In these restrictive housing units, cell doors are mechanically opened by a guard in the Control Center (the "Bubble") and not by a guard on the floor. See *id.* at ¶¶6.
4. Attached as Exhibit 1 is a letter that counsel for Plaintiffs sent to counsel for Defendants on August 20, 2010, notifying them that "Plaintiffs are considering filing a motion for preliminary injunction" because Plaintiffs "have reason to believe that a constant stream of prisoner-on-prisoner assaults is occurring at ICC as a result of guards 'popping' the wrong doors." Plaintiffs requested information as to how frequently these incidents have occurred and what Defendants were doing to eliminate these errors.
5. Attached as Exhibit 2 is Defendants' September 22, 2010, response. Defendants provided a chronological list of these assaults. Defendants' list shows that during the fourteen-month period between July 11, 2009 and September 8, 2010, there were twelve such incidents, six of which occurred in D-2 Pod. These twelve incidents averaged approximately one every six weeks, with the last three occurring even more frequently than that. Defendants also admitted that guards have wrongly opened other doors

besides the ones that precipitated the violent confrontations.<sup>3</sup> Defendants' letter claimed that efforts were underway to halt these frequent errors.

6. Attached as Exhibit 4 is Plaintiffs' September 24, 2010, response to Defendants' letter. Plaintiffs complimented Defendants on what appeared to be a considered effort to eliminate these staff errors. The response also states: "We believe that if your clients had investigated the first of these incidents--or even the fifth--they could have prevented all the ones that occurred after it."
7. Attached as Exhibit 3 is an e-mail from counsel for Defendants dated December 1, 2010. The e-mail acknowledges that a thirteenth assault caused by a wrongful door opening occurred on November 24, 2010, making this the seventh one in D-2 Pod, and the thirteenth in seventeen months.
8. In the majority of these thirteen incidents (including the three most recent ones), the guard in the Control Center mistakenly opened more than one door, resulting in a prisoner being attacked by multiple assailants. See, e.g., Declaration of Michael Olson, Declaration of Michael Miera, and Declarations (filed under seal) of Prisoners A, B, C, D, and E. The most violent incident occurred on August 10, 2010, when a guard wrongly opened some twenty

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<sup>3</sup> For purposes of this proceeding, Plaintiffs are willing to accept Defendants' list of assaults because it contains *far* more assaults than should have occurred. But emphasis should be placed on the numerous additional errors that did not result in an assault. Each one was equally as life-threatening. Filed under seal is the Declaration of a former corrections officer who worked in these units in 2009 and 2010. This officer states that cell doors were "opened in error" so frequently that he "was in a constant state of fear that the doors would be accidentally popped and I, or others, would be assaulted." See Exhibit 16 (Declaration of Officer R) at ¶¶6. See *also* Exhibit 18 (Declaration of Christopher Millward.)

doors, releasing at least twenty prisoners who then assaulted four rival gang members, sending two of them to the hospital.

9. The housing unit in which the August 20 incident occurred, A-Pod, is administrative segregation, where only one prisoner is allowed out of his cell at a time and only in restraints. Thus, the opening of so many doors in this Pod was objectively careless. A trained officer would know that opening multiple doors in this unit is *never* permitted (absent something like a fire).
10. In the most recent incident (November 24, 2010), two guards made errors. (Defendants' December 1, 2010 e-mail refers to only one error.) According to the e-mail, a guard in F-Pod thought he was in D-Pod and radioed the guard in the Control Center to open certain doors in D-Pod rather than F-Pod. However, that mistake was then compounded by the guard in the Control Center, who had recently released several prisoners in D-Pod so that they could shower. This guard should have known that other prisoners could not be released at the same time, and yet he proceeded to release three more prisoners, who then assaulted one of the prisoners taking a shower. See Declaration of Michael Miera at ¶31.
11. The Idaho Maximum Security Institution (IMSI) contains housing units similar to the secured units at ICC. According to the Warden of IMSI, Randy Blades, during the same seventeen months in which ICC had thirteen wrongful door openings that resulted in assaults from staff error, IMSI had only two (plus a third incident that resulted from a mechanical failure), and none during the past eight months. See Exhibit 17 (Affidavit of Randy Blades).

## 2. Legal Argument

Prison officials "must 'take reasonable measures to guarantee the safety of the inmates.'" *Farmer*, 511 U.S. at 832, quoting *Hudson v. Palmer*, 468 U.S. 517, 526-27 (1984). See also *Hoptowit*, 682 F.2d at 1250 ("Prison officials have a duty to take reasonable steps to protect inmates from physical abuse.") Once a risk to a prisoner's safety becomes known to prison administrators, "they ha[ve] a constitutional duty to consider all reasonable means of protecting [him]." *Howard v. Waide*, 534 F.3d at 1240. A prison official who "knows of and disregards an excessive risk to inmate health or safety" is deliberately indifferent. *Farmer*, at 837. See *Clouthier*, 591 F.3d at 1245.

Warden Valdez had an Eighth Amendment duty to adequately investigate the first wrongful door opening in July 2009 that caused an assault. See *Skinner v. Uphoff*, 234 F. Supp.2d at 1214. This Court, however, need not decide whether Valdez conducted the requisite investigation in July 2009. The issue is easier than that. The uncontested facts show that during the past seventeen months, at least *thirteen unnecessary and entirely preventable assaults* have resulted from repeated staff errors in opening the wrong cell doors. Moreover, Defendants acknowledge that many similar errors were made that, fortunately, did not result in violent confrontations but which could have.

Allowing such frequent errors over such a prolonged period of time crosses the Eighth Amendment line. Here, as in *Gomez v. Vernon*, the inescapable conclusion is that Valdez and Wengler have turned a blind eye to these repeated errors. See *Gomez*, 255 F.3d at 1237. Four of these assaults occurred during

Wengler's brief tenure, including the most violent of the thirteen (the August 10 assault), and the last one occurred just five weeks ago. Whatever steps Wengler may have taken to abate these persistent errors have been woefully inadequate and far below what the circumstances require.<sup>4</sup>

Plaintiffs are submitting Declarations from six victims of assaults that occurred during Wengler's tenure. See Declarations of Michael Olson, Michael Miera, and those filed under seal as Declarations A, B, C, and D. Wengler may view these incidents as "accidents," but to these men, they were terrifying experiences that left them with physical and psychological scars. Two of these men were hospitalized due to their injuries. One victim, Michael Miera, was assaulted on two different occasions (June 28 and November 24, 2010) due to these staff errors.

One of two things must be true: Valdez and Wengler either failed in their duty to investigate the causes of these incidents, or they failed in their duty to fashion an appropriate solution. These staff errors were not trivial matters; on the contrary, each one (including the ones that did not result in an assault) posed a substantial risk to life and limb. These incidents should have engendered

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<sup>4</sup> Defendants will likely inform the Court that Wengler terminated the employment of the guard who opened the twenty doors in A-Pod on August 10, 2010. However, that "remedy" is like placing a band-aid over a gaping wound. One of the victims of this attack, Prisoner D, was visited in the infirmary by the Assistant Chief of Security shortly after the assault and was told that the guard who opened the doors was a "trainee." See Declaration of Prisoner D (filed under seal) at ¶6. In that case, the supervisor who *assigned* a trainee to such a sensitive post deserved discipline more than did the trainee. Similarly, if Defendants mention this one remedial act, they should state whether Wengler and Valdez took remedial acts following the other thirteen assaults *and* the many other instances in which guards wrongly opened cell doors.

immediate, serious, and dedicated consideration, and Defendants should have "consider[ed] all reasonable means" to end them. See *Howard v. Waide*, 534 F.3d at 1240.

The compelling evidence presented here satisfies the objective and subjective standards of the Eighth Amendment test. First, the uncontested facts show that prisoners at ICC are "incarcerated under conditions posing a substantial risk of serious harm." *Farmer*, at 834. Seventeen months of errors producing thirteen assaults leaves no doubt on that score. Second, the Court is entitled to assume from the "longstanding, pervasive, [and] well-documented" nature of these persistent errors that Valdez and Wengler have been deliberately indifferent. Such evidence presents a *prima facie* case of callous disregard for prisoner safety. See *Farmer*, 511 U.S. at 842; *Robinson v. Prunty*, 249 F.3d at 866-67; *Hearns*, 413 F.3d at 1041; *Hoptowit*, 682 F.2d at 1250; *Skinner v. Uphoff*, 234 F. Supp.2d at 1213-1215. See also *Gomez v. Vernon*, 255 F.3d at 1217 (noting that prison officials who allow subordinates to persist in making the same errors exhibit a "turn-a-blind-eye approach" to their constitutional duties).

Plaintiffs retained an eminent corrections expert, Charles Montgomery, to provide guidance and testimony on this issue. See Exhibit 10 (Affidavit of Charles Montgomery). Mr. Montgomery, as his resume reflects, has worked in the field of corrections for more than forty years. He was the Warden of the Georgia State Penitentiary from 1982 to 1984. Following that, Mr. Montgomery held a number of top-level administrative positions at facilities operated by the U.S. Bureau of Prisons. From 1989 through 1992, Mr. Montgomery served as the Director of

Puerto Rico's penal system. With regard to the uncontested facts presented in the instant case, Mr. Montgomery states:

Defendants admit that since July 2009, a minimum of thirteen incidents involving the "inadvertent" opening of wrong cell doors due to "staff error" at the Idaho Correctional Center (ICC) has resulted in violent confrontations between prisoners, and Defendants also acknowledge that there have been other errors that did not result in any conflict or injury.

Based on the light of reason and experience, I draw two general conclusions from these facts.

First, there is a significantly high probability that the administrators of ICC have been far less than diligent insofar as ensuring that inmates receive reasonable protection from violence. *The high incidence of these types of errors simply should not have been allowed to continue.* The initial incidents should have been thoroughly investigated and appropriate short and/or long term corrective action should have been implemented to prevent these types of occurrences, regardless of the cause.

Second, there is a significantly high probability that the administrators of ICC have assigned staff to the Control Centers (from which cell doors are mechanically opened) who are either improperly trained or, if properly trained, are careless and inattentive to the health and safety of prisoners and staff. A worst case scenario may even include staff malfeasance in the performance of their duties.

. . . There is no question in my mind that *reasonably competent administrators of a prison would have thoroughly investigated the first of these incidents and initiated whatever corrective action was deemed appropriate to prevent further incidents of this nature.*

While I recognize these types of events can and do occur, albeit far less frequently, at other prisons, I have reviewed enough documents which are related to this case to believe *there is an obvious shortcoming in the administration at the Idaho Correctional Center which needs to be addressed immediately.*

Given the length of time these incidents have been allowed to continue and in light of the injuries which have already been

suffered as well as the degree of probability that others will occur in the future, I believe it is imperative that some type of appropriate remedial relief be forthcoming.

See Exhibit 10 ¶¶ 3-9 (emphasis added).

Plaintiffs have satisfied their burden of proof, and the burden now shifts to the Defendants. A prison official, *Farmer* explains, who adequately investigates a risk to inmate safety and then "respond[s] reasonably to the risk" does not violate the Eighth Amendment "even if the harm ultimately was not averted." *Id.*, 511 U.S. at 844. Therefore, in order to avoid Eighth Amendment liability, Valdez and Wengler must show that as soon as the first staff error occurred in July 2009, an adequate investigation was conducted and reasonable solutions were implemented, and that when the second error occurred, another investigation was commissioned and additional solutions were implemented, and that when the third error occurred, it, too, was thoroughly investigated. See *Skinner v. Uphoff*, 234 F. Supp. at 1214. In other words, they must show that they did not turn a blind eye to these errors.<sup>5</sup>

If the Defendants conducted these investigations and implemented a series of solutions (all of which ultimately proved unsuccessful), they will easily be able to prove it. As Mr. Montgomery states in his Affidavit, prison administrators know the importance of documenting investigations. Thus, if

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<sup>5</sup> Defendants cannot claim that they already knew why each of these errors was occurring--and thus had no need to investigate each one--because if they already knew, then they should have fixed the problem or closed those housing units. The only option not constitutionally permitted was the one they chose to follow: allowing these objectively dangerous errors to persist.

Defendants fail to submit investigative reports, then investigations did not occur.

Mr. Montgomery states:

Reasonably competent jail/prison administrators would require subordinates to not only document each and every inadvertent or negligent cell door opening, he or she would instruct subordinates to implement both adequate short and long term remedies for these types of errors and/or malfunctions, to keep him or her apprised of the progress as well as to document the implementation of same.

In addition, reasonably competent jail/prison administrators would have commissioned a thorough investigation into each incident in which staff error precipitated inmate violence in order to determine how to avoid recurrence. *These investigations and the corrective actions recommended by them would be fully documented.*

See Exhibit 10 ¶¶ 11-12 (emphasis added).

Given the sheer number of these errors, their longevity, and the substantial risk of injury each one posed, the ultimate conclusion reached by Mr. Montgomery is inescapable: "there is an obvious shortcoming in the administration at the Idaho Correctional Center which needs to be addressed immediately." Exhibit 10 (Affidavit of Charles Montgomery) at ¶8. Plaintiffs are entitled to injunctive relief to protect against further injury, and it is only through the issuance of such relief that the prisoners at ICC can hope to obtain the protection from bodily harm to which they are entitled.

### **III. DEFENDANTS' "DORs TO VICTIMS" POLICY VIOLATES THE EIGHTH AMENDMENT**

#### **A. Statement of Facts**

1. An established policy at ICC during the tenures of both Warden Valdez and Warden Wengler was--and still is--to issue Disciplinary Offense Reports

(DORs) to all persons involved in a physical altercation who throw a punch or take some other aggressive action against another prisoner, *including persons who were the victims of an attack and acted completely in self-defense*. A DOR for "battery" or "mutual combat" is viewed as appropriate punishment for such conduct.

2. In the October 2009 "Chow Hall" incident about which this Court has already written, for instance, three prisoners (Ibarra, Kelly, and Rocha) who were eating dinner in the chow hall, and two innocent bystanders seated nearby (Piña and Barrios), were assaulted by some ten to fifteen prisoners. All five were issued DORs for battery, and four were convicted, even though they acted entirely in self-defense. See *Riggs v. Valdez*, 2010 WL 4117085 at \*7-8 (D. Idaho 2010).
3. The Hearing Officer in Piña's DOR hearing wrote: "You were seen on video as one of the individuals fighting. As soon as you threw a punch *even to defend yourself* you became the aggressor" and committed the infraction. (Emphasis added.) See Exhibit 5. Barrios and Rocha received similar explanations for their DOR convictions. See Exhibits 6 and 7, respectively.
4. Similarly, as shown in Exhibit 8, a prisoner in January 2009 challenged his "mutual combat" DOR on the grounds of self-defense. The prisoner explained: "I only tried to defend myself. He was the one who started the fight. I took several punches before I fought back--see photos. This is not fair by no means." Nevertheless, he was convicted under the following rationale:

"You are allowed to deflect punches and take action to avoid getting hit; however, once you throw a punch, it becomes mutual combat."

5. On June 28, 2010, during Wengler's tenure, Michael Miera and Michael Olson were in the dayroom of D-2 Pod when a guard wrongly opened two cell doors. Three prisoners rushed out of their cells and attacked the two of them. These men defended themselves and, as a result, were issued DORs. In fact, their initial DORs for "battery" were dismissed and much harsher charges of "Class A, STG violence" were imposed. (STG stands for Security Threat Group, or gang involvement.) They appealed their convictions to the Warden, and their convictions were affirmed. See Declaration of Michael Miera ¶¶23-25; Declaration of Michael Olson, ¶¶14-17.
6. Filed under seal is Exhibit 16, the Declaration of Officer R, who worked at ICC as a corrections officer for most of 2009 and 2010. Officer R states in his Declaration: "I was informed by my supervisors that it is a policy at ICC, though unwritten, that all of those involved in a fight will get a DOR, even the victims."
7. As previously discussed, the most violent assault that occurred from a wrongful door opening is the August 10, 2010, incident in A-Pod, in which some twenty doors were opened by mistake and four members of one gang were assaulted by some twenty members of rival gangs. All four victims were seriously injured and two required emergency hospitalization. All four of these victims received DORs. See Declarations (filed under seal) of Prisoners A, B, C, and D.

8. ICC's (unwritten) policy of issuing DORs to victims for acting in self-defense has been expressly rejected by the Virtual Prison, the agency within the Idaho Department of Corrections that oversees the operation of ICC. Attached as Exhibit 9 is an appeal decision rendered on January 10, 2010 by Shannon Cluney, the Director of the Virtual Prison, expressly overturning a ICC DOR that had been issued to the victim of an assault. Mr. Cluney wrote: "*Upon review of the information presented, it appears that you were defending yourself from attack. DOR will be dismissed and all record of this incident purged from your file.*" (Emphasis added.)
9. Despite this appellate decision, ICC (a) has failed to purge from prisoner files the numerous DORs issued to the victims of assault who were defending themselves, such as Piña, Barrios, Rocha, and Ibarra, and (b) ICC has not instructed officers to stop issuing DORs to the victims of assault who were defending themselves. On the contrary, as Officer R states in his Declaration, issuing such DORs continued to be the practice during 2010.
10. Being convicted of a DOR, particularly one for violence such as battery and mutual combat, usually results in significant disciplinary punishment, including placement in segregation for weeks or months (with its attendant loss of out-of-cell time, significantly decreased access to education and rehabilitative programs, and reductions in recreation, visitation, commissary, and telephone privileges), and for those prisoners eligible for parole, a likely forfeiture of parole opportunity because the Parole Board takes a dim view of such misbehavior. Every prisoner who submitted a Declaration in this

proceeding who was convicted of a DOR for defending himself has described the severe disciplinary repercussions of that conviction, and more than one has likely lost any realistic opportunity for parole as a consequence. See Declarations of Michael Olson ¶¶24; Michael Miera ¶¶39-44; Prisoner A ¶¶26-28; Prisoner B ¶32; Prisoner C ¶21; Prisoner D ¶34.

### **Legal Argument**

Corrections expert Charles Montgomery testifies as follows regarding Defendants' policy of issuing DORs to victims:

Issuing Disciplinary Reports to prisoners who defend themselves against bodily injury flies in the face of common sense. It is, in fact, inconsistent with acceptable correctional practices to issue a Disciplinary Report to the victim of an assault for doing nothing more than defending himself (or herself). Prisons that issue DORs to the victims of an unprovoked assault require prisoners to choose between allowing the assailant to continue beating them, on the one hand, and protecting themselves from such assault only to receive disciplinary punishment, on the other hand, a choice that serves no legitimate penological purpose. Prisoners who are attacked should not receive a DOR unless it is proven that at some point the victim responded with patently excessive force, such as by continuing to retaliate after the assailant had been subdued.

See Exhibit 10 (Affidavit of Charles Montgomery) ¶16.

Defendants' policy is counter-intuitive. It requires the victim of an assault to offer no affirmative resistance and to allow himself to be beaten for as long as the assailant wishes to continue. It makes no sense to punish someone for undertaking the perfectly natural act of self-defense.

Moreover, Defendants' policy is unwritten and ambiguous. According to one official, the policy allows a prisoner to "deflect punches." See Exhibit 8. How is a prisoner (or a guard) to know when a deflection constitutes aggression?

Defendants may contend that it is sometimes difficult to determine who was the aggressor and who was the victim in a prisoner-on-prisoner confrontation and, therefore, guards are instructed to issue DORs to both parties. But if that is truly their defense, it cannot withstand scrutiny. In the first place, there are many instances in which guards can *easily* determine which prisoner was the victim, as the "Chow Hall" incident illustrates. But the bottom line is this: the Eighth Amendment prohibits cruel and unusual punishments, and there is nothing more cruel than to punish someone who does not deserve to be punished. The criminal law recognizes that human beings are entitled to defend themselves from bodily harm, and there is no legitimate penological justification for denying that right to a prisoner. Defendants' "DORs to victims" policy violates the Eighth Amendment.

In *Gomez v. Vernon*, the Ninth Circuit affirmed an order issued by Judge Boyle that required IDOC to expunge a DOR from the file of a particular prisoner because it had been issued in violation of his constitutional rights. *Id.*, 255 F.3d at 130. ICC should be ordered to do no less for all the prisoners still in their custody who were issued DORs for defending themselves from assault. Those DORs should never have been issued and, unless expunged, they will continue to haunt the prisoners who received one.<sup>6</sup>

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<sup>6</sup> Plaintiffs place the following argument in the margin because resolving this particular matter is *not* necessary in order to adjudicate the "DORs to victims" issue. However, the matter is serious, and it deserves to be aired at this juncture, at least briefly. As noted in the Statement of Facts, on August 10, 2010, some twenty prisoners left their cells as a result of guard errors and assaulted four rival gang members, and all four of these victims were issued DORs. Plaintiffs *besech* this Court to examine the Declarations of the four victims,

#### **IV. PLAINTIFFS ARE ENTITLED TO INJUNCTIVE RELIEF**

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Prisoners A, B, C, and D (filed under seal). Note in particular that all four prisoners received virtually identical DORs which claimed that each prisoner "exited his cell," then "stood on the top tier of the unit and waited as other inmates from a rival STG group [gang] approached him and commenced an assault on him." Each prisoner was issued a DOR based on the rationale that he "had the option to return to his cell and secure the door [but] he chose to stand on the tier and allow the assault to occur." These DORs are a cover-up. As the video of this incident will show, and as these four prisoners explain in their Declarations, all four of them had arrived in these cells just a few hours beforehand and they were waiting to receive their mattresses. It was now about 8:00 p.m. When their doors popped opened, *one* of the four exited his cell thinking his mattress was arriving. The notion that these vastly outnumbered gang members would voluntarily expose themselves to the violence that did, in fact, occur is absurd. In fact, three of the four were immediately assaulted *inside* their cells (each by at least five prisoners). In addition to examining their Declarations, Plaintiffs respectfully request that the Court review the Declaration of Officer R (filed under seal as Exhibit 16). Officer R testifies that two of these victims had confided in him a few weeks earlier that they were frightened for their lives, and requested his assistance in protecting them from assault by rival gang members by removing them from their midst. Officer R arranged for them to meet with supervisory officials regarding their concerns. Yet these DORs would have one believe that all four of these men walked into harm's way and "waited" while some twenty rival gang members "approached [them] and commenced an assault." Nothing could be further from the truth. (Hopefully, Defendants will attach the video tape of this incident to their reply brief.) As Prisoner A states in his Declaration: "I did not--and would never--leave my cell to talk with the prisoners on A-Pod, many of whom are mortal enemies of mine." Prisoner B states: "Issuing DORs to us was unfair and very cruel. It's like saying that I wanted to be assaulted. I didn't go outside my cell hoping to fight twenty prisoners, and I definitely would have closed my door if I knew what was happening." Prisoner C states: "If I truly could have avoided the assault, I would have. I do not enjoy being stomped on and beaten." Prisoner D states: "Those statements are totally false. The video tape will prove this. I did *not* leave my cell, go to the top of the unit and wait to be assaulted. I was attacked inside my cell." Two of these four prisoners were beaten so badly, they required emergency medical care. In fact, as Prisoner C states in his Declaration, one of the administrators with whom he spoke about his fears (after the meeting was arranged through Officer R) was Deputy Warden Kessler. A couple of weeks later, Kessler reviewed this prisoner's DOR appeal. Kessler knew from his meeting that this prisoner was scared of being assaulted. Yet Kessler affirmed the prisoner's DOR conviction which accused this prisoner of walking outside his cell and waiting to be assaulted. These DORs should be expunged.

Both of the policies and practices at issue here--the "wrong cell door" and the "DORs to victims" policies and practices--are currently causing Plaintiffs to suffer irreparable harm. Plaintiffs satisfy all the prerequisites of Rule 65 of the Federal Rules of Civil Procedure for the issuance of a preliminary injunction: (1) Plaintiffs will suffer irreparable injury if the relief is denied; (2) Plaintiffs are likely to prevail on the merits; (3) the balance of potential hardships favors Plaintiffs; and (4) the public interest favors granting this relief. See *Winter v. Natural Resources Defense Council, Inc.*, \_\_\_ U.S. \_\_\_, \_\_\_, 129 S.Ct. 365, 374 (2008). See also *Mayweathers v. Newland*, 258 F.3d 930 (9<sup>th</sup> Cir. 2001) (granting preliminary injunction to prisoners whose rights were in jeopardy); *Gammett v. Idaho State Bd. of Corrections*, 2007 WL 2684750, \*4 (D. Idaho, Sept. 7, 2007) (extending a preliminary injunction issued to a prisoner whose rights were being denied).

In a word, Defendants cannot be depended on to halt further wrongful openings of cell doors, and in addition, they apparently have no intention or desire to end their longstanding practice of issuing DORs to the victims of assault who engage in self-defense. The conclusion reached by Charles Montgomery is compelling in this regard:

[T]here is an obvious shortcoming in the administration at the Idaho Correctional Center which needs to be addressed immediately.

Given the length of time these incidents have been allowed to continue and in light of the injuries which have already been suffered as well as the degree of probability that others will occur in the future, I believe it is imperative that some type of appropriate remedial relief be forthcoming.

See Exhibit 10 ¶¶ 8-9.

The balance of hardships favors the Plaintiffs. Defendants will suffer no harm in finally complying with the Eighth Amendment, whereas Plaintiffs are likely to suffer harm without the issuance of injunctive relief. It should be a simple matter, for instance, for ICC to instruct guards to cease issuing DORs to prisoners who appear to have been the victims of an unprovoked assault and who did nothing more than engage in self-defense. See *Mayweathers v. Newland*, 258 F.3d at 936 (upholding the issuance of a preliminary injunction where, as here, prison officials were issuing disciplinary punishments that violated federal law). As for the wrongful cell door openings, the first thing that should occur is a careful and thorough investigation into each past occurrence (whether it resulted in violence or not), followed by the development of an effective remedial plan. Plaintiffs respectfully request that such a comprehensive investigation be ordered as soon as the Court has an opportunity to consider the matter. An investigation of this nature should entail minimal expense to Defendants.

The public has a strong interest in the proper administration of its penal facilities, and it has no interest in allowing prison officials to violate the Eighth Amendment and impose cruel and unusual punishments on prisoners. Plaintiffs have a significant and indeed paramount interest in avoiding unnecessary and entirely preventable physical injury, and avoiding unnecessary disciplinary punishments. Here, then, "the movant's right to relief [is] clear and unequivocal." See *Dominion Video Satellite v. Echostar Satellite Corp.*, 269 F.3d 1149, 1154

(10<sup>th</sup> Cir. 2001); *Mayweathers v. Newland*, 258 F.3d at 936. See also *Playfair v. South Lemhi Sch. Dist. 292 Bd. of Trustees*, 2009 U.S. Dist. LEXIS 67924 (D. Idaho 2009); *Planned Parenthood of Idaho, Inc. v. Wasden*, 376 F. Supp.2d 1012 (D. Idaho 2005).

As demonstrated above, the material facts are not in dispute. With respect to the "wrong cell doors" policy and practice, it is uncontested that thirteen assaults have already occurred--and many others could have occurred--as a result of Defendants' longstanding, pervasive, and well-documented practice of guards opening the wrong cell doors. Similarly, Defendants own documents demonstrate that ICC has established by unwritten policy and custom the practice of issuing DORs to the victims of assaults who defend themselves. Therefore, Plaintiffs are entitled to partial summary judgment on these two issues (followed by the issuance of appropriate relief, which in this instance would be a permanent injunction). See *Celotex Corp. v. Catrett*, 477 U.S. 317 (1986); *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 255-56 (1986); *British Motor Car Distributors, Ltd. v. San Francisco Automotive Industries Welfare Fund*, 882 F.2d 371, 374 (9<sup>th</sup> Cir. 1989).

Whichever injunctive relief may be granted--preliminary or permanent--it must comply with the Prison Litigation Reform Act, 18 U.S.C. § 3626, and thus be "narrowly drawn, extend[] no further than necessary to correct the violation of the Federal right, and [be] the least intrusive means necessary to correct the violation of the Federal right." *Id.* at § 3626(a)(1). See *Armstrong v. Davis*, 275 F.3d 849, 872 (9<sup>th</sup> Cir. 2001); *Gomez v. Vernon*, 255 F.3d at 1129. One option,

of course, is to give Defendants a certain amount of time, 21 days perhaps, to submit to the Court the results of their investigations along with a proposed remedial plan designed to halt as expeditiously as possible the ongoing violations. See *Lewis v. Casey*, 518 U.S. 343, 361-62 (1996) (recognizing that except in extraordinary circumstances, prison officials should be allowed the first opportunity to devise a remedial plan to cure violations of federal rights). With regard to the "DORs to victims" issue, Defendants' proposed remedial plan should include a guarantee that DORs previously issued to the victims of unprovoked assaults will be purged from ICC's records and that ICC will share with IDOC this information. See *Gomez v. Vernon*, 255 F.3d at 130 (upholding an injunction that required prison officials to purge a DOR from prison files).

### **CONCLUSION**

For the reasons set forth above, Plaintiffs respectfully request that the Court either issue preliminary injunctive relief or grant partial summary judgment followed by the issuance of a permanent injunction.

DATED this 30<sup>th</sup> day of December, 2010.

/s/ Stephen L. Pevar

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**CERTIFICATE OF SERVICE**

I hereby certify that on December 30, 2010, I electronically filed the foregoing Brief in Support of Plaintiffs' Motion for Preliminary Injunction and Partial Summary Judgment with the Clerk of Court using the CM/ECF system which sent a notice of electronic filing to the following persons:

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