UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT TACOMA

DONALD BANGO, SCOTT BAILEY,

Plaintiffs,

v.

PIERCE COUNTY, WASHINGTON, et al.,

Defendants.

CASE NO. 3:17-CV-06002-RBL-DWC

REPORT AND RECOMMENDATION

Noting Date: November 2, 2018

The District Court referred this action, filed pursuant to 42 U.S.C. § 1983, to United States Magistrate Judge David W. Christel. Presently pending before the Court is Plaintiffs Donald Bango and Scott Bailey's Amended Motion for Class Certification ("Motion"). Dkt. 78.

The Court concludes Plaintiffs have failed to meet the numerosity and commonality requirements for class certification under Federal Rule of Civil Procedure 23(a). Plaintiffs have also failed to meet the requirements of Rule 23(b). Accordingly, the Court recommends Plaintiffs' Motion (Dkt. 78) be denied.

I. Background

Plaintiffs, individuals incarcerated at the Pierce County Jail ("Jail") at the time the Complaint was filed, allege Defendants Pierce County, Washington and Pierce County Sheriff's Department are failing to provide adequate mental health treatment in violation of the Eighth and Fourteenth Amendments, Title II of the Americans with Disabilities Act ("ADA"), and the Rehabilitation Act ("RA"). Dkt. 1. Specifically, Plaintiffs allege Defendants are: (1) failing to provide adequate mental health screenings; (2) ignoring clear signs of mental illness and requests for treatment; (3) refusing to provide necessary treatment for mental illnesses; (4) delaying and denying basic mental health care, including medications; (5) punishing Plaintiffs for non-violent behaviors caused by their mental illnesses; (6) and housing Plaintiffs in solitary confinement despite clinically proven negative impacts of isolation on individuals with mental illness. *Id*.; *see also* Dkt. 31.[1]

On August 29, 2018, Plaintiffs filed the Motion. Dkt. 78. Defendants filed a Response on September 17, 2018, and Plaintiffs filed a Reply on September 21, 2018. Dkt. 90, 102. The Court heard oral argument on September 27, 2018. [2]

II. Discussion

A class action is "an exception to the usual rule that litigation is conducted by and on behalf of the individual named parties only." *Wal–Mart Stores, Inc. v. Dukes*, 564 U.S. 338, 348 (2011) (quoting *Califano v. Yamasaki*, 442 U.S. 682, 700–01 (1979)). In order to justify a departure from that rule, "a class representative must be part of the class and 'possess the same

---

[1] Plaintiffs also alleged Defendants refused to provide needed psychiatric medications upon release from the Jail. This claim was dismissed on May 7, 2018. Dkt. 43; *see also* Dkt. 41.

[2] During the hearing, the Court heard argument from Attorney Sal Mungia, on behalf of Plaintiffs, and Attorney Michelle Luna-Green, on behalf of Defendants.

interest and suffer the same injury' as the class members." *Id.* (citing *E. Tex. Motor Freight Sys., Inc. v. Rodriguez*, 431 U.S. 395, 403 (1977)). "Class certification is proper only if the trial court has concluded, after a 'rigorous analysis,' that Rule 23(a) has been satisfied." *Wang v. Chinese Daily News, Inc.*, 737 F.3d 538, 542–43 (9th Cir. 2013) (quoting *Dukes*, 564 U.S. at 350). As part of this analysis, the court "*must* consider the merits [of the substantive claims] if they overlap with [the class certification] requirements." *Ellis v. Costco Wholesale Corp.*, 657 F.3d 970, 981 (9th Cir. 2011) (emphasis in original).

A plaintiff seeking class certification must show he meets the requirements of Federal Rule of Civil Procedure 23(a), which states:

> One or more members of a class may sue or be sued as representative parties on behalf of all members only if:
>
> (1) the class is so numerous that joinder of all members is impracticable [("numerosity")];
> (2) there are questions of law or fact common to the class [("commonality")];
> (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class [("typicality")]; and
> (4) the representative parties will fairly and adequately protect the interests of the class [("adequacy of representation")].

Fed. R. Civ. P. 23(a).

The proposed class or subclass must also satisfy the requirements of one of the sub-sections of Rule 23(b), "which defines three different types of classes." *Leyva v. Medline Industries, Inc.*, 716 F.3d 510, 512 (9th Cir. 2013). In this case, Plaintiffs contend that their proposed class meet the requirements of Rule 23(b)(2), which requires that "the party opposing the class has acted or refused to act on grounds that apply generally to the class, so that final injunctive relief or corresponding declaratory relief is appropriate respecting the class as a whole." Fed. R. Civ. P 23 (b)(2); *see also* Dkt. 78.

"As a threshold matter, and apart from the explicit requirements of Rule 23(a), the party seeking class certification must demonstrate that an identifiable and ascertainable class exists." *Mazur v. eBay, Inc.*, 257 F.R.D. 563, 567 (N.D.Cal. 2009). "Certification is improper if there is no definable class." *Guzman v. Bridgepoint Educ., Inc.*, 305 F.R.D. 594, 610 (S.D. Cal. 2015) (internal quotation omitted). "'A class definition should be precise, objective, and presently ascertainable,' though 'the class need not be so ascertainable that every potential member can be identified at the commencement of the action.'" *Mazur v. eBay Inc.*, 257 F.R.D. 563, 567 (N.D. Cal. 2009) (quoting *O'Connor v. Boeing N. Am., Inc.*, 184 F.R.D. 311, 319 (C.D.Cal. 1998)). "A class definition is inadequate if a court must make a determination of the merits of the individual claims to determine whether a person is a member of the class." *Hanni v. Am. Airlines, Inc.*, 2010 WL 289297, at *9 (N.D.Cal. Jan. 15, 2010).

However, "many courts have determined that [ascertainability] is of less importance or not applicable at all when considering certification under Rule 23(b)(2). *Dunakin v. Quigley*, 99 F.Supp.3d 1297, 1325 (W.D. Wash. 2015). "Although the Ninth Circuit has not ruled on this issue, several other circuit courts have held that, due to the unique characteristics of a Rule 23(b)(2) class, it is improper to require ascertainability for a Rule 23(b)(2) class." *Id*. at 1326; *see also Shelton v. Bledsoe*, 775 F.3d 554, 559–63 ("[A]scertainability is not a requirement for certification of a (b)(2) class seeking only injunctive and declaratory relief ...."); *Shook v. El Paso*, 386 F.3d 963, 972 (10th Cir. 2004) ("[M]any courts have found Rule 23(b)(2) well suited for cases where the composition of the class is not readily ascertainable.").

Defendants assert the class is too broad and ambiguous. *See* Dkt. 90. Essentially, Defendants are asserting the defined class does not meet the ascertainability doctrine. However, Plaintiffs are moving for class certification under Rule 23(b)(2). *See* Dkt. 78. Therefore, the

Court finds any failure to prove the ascertainability of the proposed class does not make class certification improper in this case. *See In re Yahoo Mail Litigation*, 308 F.R.D. 577, 597 (N.D. Cal. 2015) ("ascertainability requirement does not apply to Rule 23(b)(2) actions").

As the Court has found failure to prove ascertainability does not make class certification improper, the Court must now determine if Plaintiffs have sufficiently shown: (1) numerosity; (2) commonality; (3) typicality; (4) adequate class representation; and (5) the Rule 23(b)(2) requirements are met.

A. Numerosity

Plaintiffs satisfy the numerosity requirement if "the class is so large that joinder of all members is impracticable." Fed. R. Civ. P. 23(a)(1); *see also Hanlon v. Chrysler Corp.*, 150 F.3d 1011, 1019 (9th Cir. 1998). The numerosity requirement demands "examination of the specific facts of each case and imposes no absolute limitations. *General Tel. Co. of the Northwest, Inc. v. EEOC*, 446 U.S. 318, 330 (1980). Nevertheless, "Plaintiffs must show some evidence of or reasonably estimate the number of class members. Mere speculation as to satisfaction of this numerosity requirement does not satisfy Rule 23(a)(1)." *Schwartz v. Upper Deck Co.*, 183 F.R.D. 672, 681 (S.D.Cal. 1999).

Plaintiffs have defined the proposed class is "all qualified individuals who have mental illnesses that are disabilities as defined in 42 U.S.C. §12102 [(ADA)] and 29 U.S.C. §705(9)(B) [(RA)], and who are now, or will be in the future, incarcerated at [the Jail]." Dkt. 1, ¶ 28; *see also* Dkt. 78, p. 2. Under the ADA,

> **(1) Disability**
> The term "disability" means, with respect to an individual--**(A)** a physical or mental impairment that substantially limits one or more major life activities of such individual; **(B)** a record of such an impairment; or **(C)** being regarded as having such an impairment (as described in paragraph (3)).

> **(2)Major life activities**
> **(A) In general** For purposes of paragraph (1), major life activities include, but are not limited to, caring for oneself, performing manual tasks, seeing, hearing, eating, sleeping, walking, standing, lifting, bending, speaking, breathing, learning, reading, concentrating, thinking, communicating, and working. **(B) Major bodily functions** For purposes of paragraph (1), a major life activity also includes the operation of a major bodily function, including but not limited to, functions of the immune system, normal cell growth, digestive, bowel, bladder, neurological, brain, respiratory, circulatory, endocrine, and reproductive functions.
> **(3) Regarded as having such an impairment**
> For purposes of paragraph (1)(C): **(A)** An individual meets the requirement of "being regarded as having such an impairment" if the individual establishes that he or she has been subjected to an action prohibited under this chapter because of an actual or perceived physical or mental impairment whether or not the impairment limits or is perceived to limit a major life activity. **(B)** Paragraph (1)(C) shall not apply to impairments that are transitory and minor. A transitory impairment is an impairment with an actual or expected duration of 6 months or less.

42 U.S.C. § 12102 (emphasis in original). 29 U.S.C. § 705(9)(B). The RA references the definition of disability as found in the ADA.

To establish numerosity, Plaintiffs submitted evidence showing, in 2017, there was an average of 85 mental health beds in use per day at the Jail. Dkt. 81-18, p. 2. Plaintiffs also cite, but do not submit as evidence, a study completed by the League of Women Voters of Tacoma-Pierce County that states, in 2015, 26% of the 1,100 inmates at the Jail were on psychiatric medications. *See* Dkt. 78, pp. 14-15; League of Women Voters of Tacoma-Pierce County, Study of Mental Health in Pierce County, 35 (Feb. 2016), http://www.piercecountywa.org/DocumentCenter/View/42628. Plaintiffs extrapolate that this study shows a quarter of inmates at the Jail, or 266 individuals, are on psychiatric medications "at any given time." Dkt. 78, p. 14.

Plaintiffs, however, do not cite to any evidence regarding the number of individuals incarcerated or who will be incarcerated who have diagnosed mental illnesses that meet the

definition of disability under the ADA or the RA. There is also no evidence showing individuals who are housed in a mental health bed or who are prescribed psychiatric medications necessarily have a mental illness resulting in a disability as defined by the ADA and the RA. Rather, Plaintiffs only speculate as to the number of individuals who would be members of the proposed class based on the average number of mental health beds being used at the Jail. *Nat'l Fed'n of Blind v. Target Corp.*, 582 F. Supp. 2d 1185, 1199 (N.D. Cal. 2007) ("[M]ere speculation as to the number of parties involved is not sufficient to satisfy the numerosity requirement."); *Marcial v. Coronet Ins. Co.*, 880 F.2d 954, 957 (7th Cir. 1989) (plaintiffs need not specify exact number in the class, but cannot rely on conclusory allegations and speculation as to the size of the class); *Celano v. Marriott Int'l, Inc.*, 242 F.R.D. 544, 549 (N.D. Cal. 2007) (finding the plaintiffs' census data and statistics were too ambiguous and speculative to establish numerosity where the plaintiffs submitted only 21 declarations of potential class members).

As Plaintiffs have not provided evidence showing a reasonable estimate regarding the number of individuals with mental illnesses that are disabilities under the ADA and the RA who are incarcerated or will be incarcerated at the Jail, Plaintiffs have not shown they meet the numerosity requirement.

B. Commonality

Rule 23(a)(2) requires "questions of law or fact common to the class." In *Dukes*, the Supreme Court held this provision requires plaintiffs to "demonstrate that the class members 'have suffered the same injury,'" not merely violations of "the same provision of law." 564 U.S. at 350 (quoting *Gen. Tel. Co. of Sw. v. Falcon*, 457 U.S. 147, 157 (1982)). Plaintiffs' claims "must depend upon a common contention" such that "determination of [their] truth or falsity will resolve an issue that is central to the validity of each one of the claims in one stroke." *Id.* "What

matters to class certification ... is not the raising of common 'questions'—even in droves—but, rather the capacity of a classwide proceeding to generate common *answers* apt to drive the resolution of the litigation." *Id.* (quoting Richard A. Nagareda, *Class Certification in the Age of Aggregate Proof*, 84 N.Y.U. L.Rev. 97, 132 (2009)).

Plaintiffs, however, are not required to show "every question in the case, or even a preponderance of questions, is capable of class wide resolution. So long as there is even a single common question, a would-be class can satisfy the commonality requirement of Rule 23(a)(2)." *Wang v. Chinese Daily News, Inc.*, 737 F.3d 538, 544 (9th Cir. 2013) (quotation marks and citation omitted); *see also Mazza v. Am. Honda Motor Co., Inc.*, 666 F.3d 581, 589 (9th Cir. 2012) (finding "commonality only requires a single significant question of law or fact"). "Where the circumstances of each particular class member vary but retain a common core of factual or legal issues with the rest of the class, commonality exists." *Evon v. Law Offices of Sidney Mickell*, 688 F.3d 1015, 1029 (9th Cir. 2012) (quotation marks and citation omitted).

In civil rights cases, commonality is satisfied where the lawsuit challenges a system-wide policy or practice that affects all of the putative class members. *Armstrong v. Davis*, 275 F.3d 849, 868 (9th Cir. 2001), *abrogated on other grounds by Johnson v. California*, 543 U.S. 499 (2005). "Where such a policy exists, 'individual factual differences among the individual litigants or groups of litigants will not preclude a finding of commonality.'" *Hernandez v. County of Monterrey*, 305 F.R.D. 132, 153 (N.D. Cal. 2015) (quoting *Armstrong*, 275 F.3d at 686). However, to determine commonality, the Court must have a precise understanding of the nature of the underlying claims. *Parsons v. Ryan*, 754 F.3d 657, 676 (9th Cir. 2014); *see also Ellis*, 657 F.3d at 981 (the court must consider the merits of the underlying claims if the clams overlap with the class certification requirements).

Plaintiffs allege the Jail's systemic policies and practices[3] are violating the Eighth and Fourteenth Amendments of the Constitution, Title II of the ADA, and the RA. Dkt. 1, 78. Specifically, Plaintiffs contend the Jail policies and practices that expose the proposed class members to a substantial risk of serious harm are as follows:

1. *Screenings*: "Failing to adequately screen for mental illnesses during the booking process or during incarceration." Dkt. 78, p. 17.

2. *Mental Health Treatment*: "Refusing to provide necessary mental health treatment, including ignoring requests for care, delaying or denying access to psychiatric medications, and refusing to provide counseling, mental health programming, and other basic mental health care." *Id*.

3. *Classification in Solitary Confinement*: "Locking people with mental illness in solitary confinement, despite the clinically proven negative impacts of isolation on people with mental illness." *Id*.

4. *Use of Force*: Punishing class members with mental illness for non-violent behaviors directly related to their mental illness through uses of force and restraints, including restraint chairs and "eyebolts." *Id*.

To establish a constitutional violation, a plaintiff must prove he suffered a sufficiently serious deprivation, such as his conditions of confinement pose a substantial risk of harm or he has a serious medical need. *See Mendiola–Martinez v. Arpaio*, 836 F.3d 1239, 1248–49 (9th Cir. 2016). "The plaintiff then must prove that the defendant was deliberately indifferent to [his] health and safety or serious medical needs." *Id*.

1. *Screenings*

Plaintiffs first contend the Jail's policies and practices of failing to adequately screen for mental illnesses during the booking process or during incarceration violate constitutional rights. *See* Dkt. 1, 78.

---

[3] The parties use the terms "policies," "practices," "procedures," and "customs" to refer to the allegations and conduct at the Jail. *See e.g.* Dkt. 1, 78, 90. Throughout this Report and Recommendation, the Court will refer to all policies, practices, procedures, and customs as "policies and practices."

The evidence shows when Plaintiff Bailey was booked into the Jail on April 2, 2017, the incarceration period relevant to the Complaint, the booking nurse noted Plaintiff Bailey was "not real pleased" about his arrest, but was cooperative with the intake assessment. Dkt. 80, Bailey Dec., ¶ 6. The intake assessment form was blank on all mental health categories. *Id*.; *see also* Dkt. 80-4. Plaintiff Bailey states he informed the nurse he had previously taken medications for his mental health. Dkt. 80, Bailey Dec., ¶ 7. However, Plaintiff Bailey's booking form does not indicate previous treatment for mental illness. *Id*.

Plaintiff Bango was arrested on December 13, 2015 and, at the time of his arrest, he informed the emergency medical technician ("EMT") that he had been diagnosed with serious mental illnesses and received counseling and medications from the Department of Veterans Affairs ("VA"). Dkt. 79, Bango Dec., ¶ 4. Plaintiff Bango also told the EMT he had considered attempting suicide in the past year. *Id*. Plaintiff Bango was placed on "suicide watch" shortly after booking. *Id*. at ¶ 5.

Plaintiffs also submitted the National Commission on Correctional Health Care's ("NCCHC") 2014 "Standards for Health Services in Jails." Dkt. 81-5. Under NCCHC's Standards, inmates should receive screening on arrival at the intake facility to ensure emergent and urgent health needs are met; this includes a screening form indicating past or current mental illness and history or current suicidal ideations. *Id*. at p. 7. NCCHC Standards also state inmates with positive mental health screenings should receive a screening with a mental health professional within fourteen days of admission to the correctional system. *Id*. at p. 15. The Jail, however, is not an NCCHC facility and does not follow NCCHC standards. Dkt. 81-1, Rhoton Depo., p. 5.

Evidence also shows that when an individual is arrested and booked into the Jail, "a booking nurse will perform an initial health receiving screen[ing] of each inmate patient." Dkt. 99, Slothower Dec., ¶ 7. Screenings are conducted with guidance through an electronic form and several of the questions contain only a single checkbox. *Id*. at ¶¶ 8-9. The booking nurse is "instructed that by leaving the checkbox unselected he or she is documenting a conclusion that all parameters of the question are false." *Id*. at ¶ 9. If the checkbox is selected, a positive response is indicated and further documentation is provided in a text box. *Id*. The screening forms are completed electronically, "which ensures a follow-up mental health assessment is scheduled where appropriate." *Id*. at ¶ 11. Inmates are asked to execute a release form at booking, as needed, to obtain medical records prior to being incarcerated. *Id*. at ¶ 12. "If during screening a person identifies that they have prescribed medications, healthcare staff attempt to obtain and evaluate the prescription information to ensure medications continue when necessary while the person is incarcerated." Dkt. 92, Harrel Dec., ¶7. "For those inmate patients that do not have an active verifiable prescription, medications are ordered for inmate patients by a prescribing treatment provider when clinically appropriate under the circumstances." Dkt. 99, Slothower Dec., ¶ 13.

During an inmate's incarceration, the mental health providers receive mental health referrals from several sources, including correction deputies, nursing staff, and self-referrals through the "kite" communication system.[4] Dkt. 96, Rhoton Dec., ¶ 5. It is the policy for the mental health providers to screen all referrals and respond according to the level of service indicated. *Id*. at ¶ 6. Kites are usually responded to on the same day the kite is sent and the longest it has taken to respond to a kite is "[m]aybe a couple of days." Dkt. 81-3, Perez Depo., p.

[4] A "kite" is a request slip used by an inmate to write a request for mental health services. Dkt. 96-1, p. 16.

12. Assessments, which occur at the time of booking and upon referral, are used to determine if there is a mental health issue. Dkt. 96, Rhoton Dec., ¶ 7.

Here, Plaintiff Bango reported he was suicidal to an EMT and was placed on suicide watch at the Jail shortly after booking. Plaintiffs fail to show how the screening process Plaintiff Bango received was inadequate. While Plaintiff Bailey's reported mental health issues and previous use of mental health medications were not included on his screening form, the evidence fails to show Plaintiff Bailey required medications or treatment upon entering the Jail. Plaintiffs also cite to the NCCHC Standards; yet, do not provide specific allegations or evidence showing how the Jail's policies and practices fail to meet these standards. Further, Plaintiffs fail to show the decision to follow different standards indicates the proposed class members' are being exposed to a substantial risk of serious harm.

Evidence of the Jail's policies and practices show inmates are screened when they enter the Jail and are provided additional treatment as necessary. Further, after booking, assessments are used to determine if an inmate has a mental health issue. Based on the allegations and evidence, Plaintiffs have not shown a systemic application of policies and practices during the screening process expose the proposed class members to a substantial risk of serious harm. Accordingly, the Court finds Plaintiffs have not shown commonality as to their claim regarding the screening processes at the Jail.

2. *Mental Health Treatment*

Plaintiffs next assert the Jail's policies and practices of denying or delaying mental health treatment are exposing the proposed class to a substantial risk of serious harm. Dkt. 1, 78.

Plaintiffs' evidence shows Plaintiff Bailey experiences suicidal ideations and has attempted to commit suicide. Dkt. 80, Bailey Dec., ¶ 1. After the booking process, Plaintiff

Bailey was placed in general population. *See* Dkt. 80-4. Plaintiff Bailey requested mental health treatment and jail providers responded to his requests. *See* Dkt. 80, Bailey Dec., ¶¶ 8-10. About a month and a half after he was incarcerated, on May 19, 2017, Plaintiff Bailey was seen by two mental health providers. *Id*. at ¶ 12. Plaintiff Bailey sent a kite on June 10, 2017, asking when medications would be started. *Id*. at ¶ 14. A mental health provider responded that the list to be seen is very long and it may be a little while longer before Plaintiff Bailey would be seen. *Id*. On June 16, 2017, Plaintiff Bailey was evaluated by the psychiatric nurse practitioner; the nurse practitioner "assessed [Plaintiff Bailey] with major depression" and prescribed Plaintiff Bailey medications. *Id*. at ¶ 15.

At the time of his arrest on December 13, 2015, Plaintiff Bango informed the EMT that he had been diagnosed with serious mental illnesses and received counseling and medications from the VA. *Id*. at ¶ 4. Plaintiff Bango also told the EMT he had considered attempting suicide in the past year. *Id*. Plaintiff Bango was placed on "suicide watch" shortly after booking. *Id*. at ¶ 5. After several days on suicide watch and in isolation cells, Plaintiff Bango was placed in general population. *Id*. at ¶ 12.

Plaintiff Bango sent kites regarding his mental health needs, which were responded to by mental health providers. Dkt. 79, Bango Dec., ¶¶ 13, 15-16, 18, 20-21, 26-28. Plaintiff Bango states his VA records indicated he had active prescriptions when he was arrested and booked into the Jail and the VA faxed a list of Plaintiff Bango's medications to the Jail. *Id*. at ¶¶ 15-16.

In January of 2016, a VA representative met with Plaintiff Bango and spoke with mental health providers at the Jail. *See* Dkt. 79-10. The VA representative was notified that Plaintiff Bango was being assessed by mental health providers, had presented with few symptoms, and a decision was made that he would not receive psychotropic medications. *Id*.; *see also* Dkt. 79,

Bango Dec., ¶ 19. On August 4, 2017, Plaintiff Bango filed a grievance concerning his lack of mental health treatment. Dkt. 79, Bango Dec., ¶ 29. A mental health provider referred Plaintiff Bango to the nurse practitioner to determine if medications would be prescribed. *Id*. On August 16, 2017, Plaintiff Bango was seen by a psychiatric nurse practitioner and mental health provider. *Id*. at ¶ 30. At that time, the psychiatric nurse practitioner prescribed an anti-depressant medication and post-traumatic stress disorder ("PTSD") medication for Plaintiff Bango. *Id*. After Plaintiff Bango filed additional kites regarding his mental health needs, the dosages for his anti-depressant and PTSD medications were increased and he was prescribed an additional medication for "racing thoughts at bedtime." *Id*. at ¶¶ 31-32, 35, 37-41.

Defendants provided evidence showing Plaintiff Bango denied being a danger to himself or others, was not exhibiting any signs of psychosis, and stated he was doing well in general population. *See* Dkt. 92, Harrel Dec., ¶¶ 13-14. In August of 2017, Plaintiff Bango denied psychotic symptoms, but reported a depressed mood with breakthrough PTSD related nightmares and intrusive memories. *Id*. at ¶ 16. Medications were started. *Id*. After twenty months in the Jail with no indication of psychosis, Plaintiff Bango kited that he was hearing voices and satellites were trying to control him. *Id*. at ¶¶ 17-19. The Jail staff did not observe psychotic symptoms. *See id*. at ¶¶ 19-21.

Janet Rhoton, the mental health manager at the Jail, stated, under the Jail's policies and practices, the goal of the Jail "Mental Health Program is to identify inmates with mental health concerns, provide assessments, and intervene in a timely and in the least restrictive manner consistent with the security needs of the [Jail] and the inmate." Dkt. 96, Rhoton Dec., ¶ 4. The mental health providers receive mental health referrals from several sources, including correction deputies, nursing staff, and kites. *Id*. at ¶ 5. It is the policy for the mental health providers to

screen all referrals and respond according to the level of service indicated. *Id*. at ¶ 6. Assessments are used to determine if there is a mental health issue. *Id*. at ¶ 7. Ms. Rhoton stated it is not uncommon "that an inmate may attempt to malinger or feign mental illness in order to avoid or in some way impact their criminal matter." *Id*. Under the Jail's policies and practices, "[t]he focus of the Mental Health Program is to serve those inmates who are at risk, as a result of a mental disorder, of presenting a danger to themselves or others, or becoming gravely disabled." *Id*. at ¶ 10. It is also Jail policy to provide continuity of mental health care during incarceration. *Id*. at ¶ 11.

As stated above, the Jail has a referral system and inmates can send "kites" regarding medical needs. A kite is usually responded to on the same day it is sent and the longest it has taken to respond to a kite is "[m]aybe a couple of days." Dkt. 81-3, Perez Depo., p. 12. Follow-up evaluations are conducted depending on the inmate's needs. *See id*. at p. 13. The Jail does not provide on-going counseling. *Id*. The Jail, however, does provide counseling to inmates, depending on symptoms, that can consist of one session or last the duration of the inmate's incarceration and the Jail provides on-going medications. Dkt. 81-2, Anderson Depo., pp. 3-5.

Defendants also submitted evidence from Ian Harrel, a licensed independent clinical social worker, stating the Jail's "policies and procedures meet or exceed standards for healthcare, including mental health care, and behavioral health screenings in the correctional setting." Dkt. 92, Harrel Dec., ¶ 5. Mr. Harrel stated the Jail's "goal is to provide basic medical attention for patients to be safe during the incarceration period." *Id*. If an inmate identifies prescribed medications during the booking screening process, healthcare staff attempt to obtain and evaluate prescription information to ensure medications continue when necessary during incarceration. *Id*. at ¶ 7. "Each medical condition and situation is different, but the [J]ail's policy is to verify active

prescriptions and if necessary continue the prescription through the health services provided in the [J]ail." *Id*.

Because individuals spend, on average, 23 days in the Jail, "it is not therapeutically appropriate to engage in deep level counseling and trauma counseling." Dkt. 92, Harrel Dec., ¶ 8; Dkt. 95, Jackson-Kidder Dec, ¶ 2 (average stay is 23 days). "One-on-one counseling may be possible in limited circumstances, but outside of treatment for acute symptoms, little therapeutic progress is likely due to the uncertain circumstances, expectations and disposition that the inmate may face." Dkt. 91, Muscatel Dec., ¶ 22. "The standard mental health modality to use in jail settings is crisis stabilization." Dkt. 92, Harrel Dec., ¶ 8.

In this case, Plaintiffs have provided allegations and evidence showing Jail employees responded to two inmates' – Plaintiffs Bango and Bailey – requests for treatment. Plaintiffs do believe the Jail provided them with an adequate level of treatment. However, Plaintiffs have not submitted any expert evidence to rebut the expert opinions from Mr. Harrel and Dr. Kenneth M. Muscatel, Ph.D. Plaintiffs' evidence merely shows a disagreement between the medical treatment requested by Plaintiffs and the Jail staff's opinion regarding necessary medical treatment, which does not show the Jail's policies and practices are being applied in a systemic way that exposes the proposed class to a substantial risk of serious harm. *See Toguchi v. Chung*, 391 F.3d 1051, 1058 (9th Cir. 2004) (mere differences of opinion between a prisoner and prison medical staff regarding the proper course of treatment does not give rise to a § 1983 claim).

Mr. Harrel declared that the Jail's policies and practices meet or exceed standards for mental health care. In contrast, Plaintiffs have not submitted any expert testimony and have, at most, provided conclusory allegations that the Jail's policies and practices violate constitutional rights and two isolated allegations of constitutional violations related to mental health treatment

at the Jail. Accordingly, the Court finds Plaintiffs have failed to show commonality as to their claim regarding the denial and delay in providing mental health treatment.

3. *Classification in Solitary Confinement*

Plaintiffs contend the Jail's policy and practice of locking inmates with mental illness in solitary confinement, despite the clinically proven negative impacts of isolation on people with mental illness, violates the proposed class members' constitutional rights. *See* Dkt. 1, 78. To support their position, Plaintiffs cite to Chapter 13 of the Mental Health Policy and Procedures Manual ("MHPPM") and Chapter 3.01 of the Policy and Procedures Manual ("PPM"). *See* Dkt. 78, p. 8. Plaintiffs, however, do not provide any explanation showing how these policies and practices have a systemic application that exposes the proposed class members to a substantial risk of serious harm.

The evidence shows classification and housing is dictated by policy. Dkt. 95, Jackson-Kidder Dec., ¶ 7. Under Chapter 13 of the MHPPM, inmates with mental health symptoms can be placed in general population, a mental health unit, or a crisis cell. *See* Dkt. 81-10, p. 3. Chapter 3.01 of the PPM states the Jail staff will implement and maintain a classification plan that ensures "inmates are classified in a fair and consistent manner according to their individual custodial management and program needs." Dkt. 81-11, p. 2.

Plaintiffs' allegations and evidence show that, at the time of his booking, Plaintiff Bango was placed on suicide watch. Dkt. 79, Bango Dec., ¶ 5. Plaintiff Bango was stripped of his clothing, placed in a "suicide smock," and put into solitary confinement. *Id*. Plaintiff Bango states that, as a result of not receiving basic mental health care, he began to mentally decompensate, have delusions and hallucinations, and wanted to die. *Id*. at ¶ 7. Additional evidence shows Plaintiff Bango's own statements regarding a suicide attempt were the basis for

placing him on suicide watch at the time of his booking on December 13, 2015. Dkt. 92, Harrel Dec., ¶ 11. He was monitored every fifteen minutes and then every thirty minutes, and, on December 16, 2015, suicide precautions were discontinued. *Id*. Plaintiff Bango was then placed in general population. Dkt. 79, Bango Dec., ¶ 12. There is no evidence Plaintiff Bango was placed on suicide watch or in isolation any other time or that Plaintiff Bailey was placed in solitary confinement.

Plaintiffs also submitted eight classification reports showing inmates with mental health concerns were classified at the "maximum" level classification. *See* Dkt. 81-12. However, several of the reports noted the inmate had prior assaultive felony convictions and/or known institutional behavior problems. *Id*. Plaintiffs also cited to, but did not provide as evidence, a 2014 "Evaluation of Pierce County Detention Operations" ("Evaluation"), which stated "there appears to be a tendency to increase the custody level of any offender who shows indications of mental health issues." *See* Dkt. 78, p. 9. The Evaluation recommended consolidating the mental health population in an appropriate housing unit. Bill Vetter, Evaluation of Pierce County Detention Operations, p. 56 (August 25, 2014), https://www.co.pierce.wa.us/DocumentCenter/View/32482.

Defendants' evidence shows it is Jail policy to ensure inmates are safe from self-harm, which includes suicide precautions. Dkt. 95, Jackson-Kidder Dec., ¶ 12. "Suicide precautions may include placing the inmate on suicide watch." *Id*. at ¶ 14. Mental health providers may recommend a level of observation an inmate may need, i.e. suicide observation; however, the final determination regarding classification and housing rests with the Classification Supervisory Team. *Id*. at ¶ 7. "The least restrictive housing is the goal/default." *Id*. If an inmate is placed in restrictive housing, the inmate may still receive visits by the chaplain, visits from professional

staff, and, if no sanction prevents, an inmate may still have visitation, limited access to commissary, and access to the library and educational materials. *Id*. If an inmate is placed on suicide watch, he is able to access in-person visitation and legal visits, but is not able access outdoor exercise, the library, the commissary, or attend church. Dkt. 81-3, Perez Depo., p. 16.

The policies and practices at the Jail show inmates may be placed in restrictive housing. However, the least restrictive hosing is the goal/default and staff will implement and maintain a classification plan that ensures inmates are classified in a fair and consistent manner according to their individual custodial management and program needs. The evidence shows Plaintiff Bailey, despite his complaints of serious mental health issues, was never subjected to restrictive housing. After reporting suicidal thoughts, Plaintiff Bango was subjected to restrictive housing when he initially entered the Jail. However, he was in restrictive housing and on suicide watch only for the first three days of his incarceration. Once he was taken off suicide watch, he was placed in general population. Despite complaints of serious mental health issues, Plaintiff Bango does not assert he was placed in restrictive housing after he was initially placed on "suicide watch." Further, the Evaluation (which again is not evidence before the court) fails to show a policy or practice of "locking" proposed class members in solitary confinement. The Evaluation shows, in 2014, inmates with mental illnesses tended to have increased classification levels, not that the proposed class members are being "locked" in "solitary confinement" because of their mental illnesses. As such, Plaintiffs have failed to show there is a systemic policy or practice of "locking people with mental illness in solitary confinement" to which all members of the proposed class are exposed. Accordingly, Plaintiffs have not shown commonality regarding the claim that individuals with mental illnesses are being locked in solitary confinement.

4. *Use of Force*

Plaintiffs also allege Defendants' policies and practices are violating the proposed class members' constitutional rights because force and restraints are used to punish class members with mental illnesses for non-violent behaviors related to their mental illnesses. Dkt. 1, 78. In their Motion, Plaintiffs cite PPM Chapters 6.11 and 6.12 and MHPPM Chapter 9 to support this claim. *See* Dkt. 78. Plaintiffs, however, have not made an adequate showing of how these specific policies and practices are systemically applied in a way that exposes the proposed class members to a substantial risk of serious harm.

Under PPM Chapter 6.11, corrections deputies may use the amount of force necessary to affect the lawful purpose intended, provided no reasonably effective alternative appears to exist. Dkt. 81-14. Further, "[p]roper restraints will be used only as a precaution against escape, to prevent self-injury, injury to others or property damage." *Id*. at p. 2. Physical force is not justifiable as punishment. *Id*. PPM Chapter 6.12 addresses the use of eyebolt restraints, which is "a metal bolt that is affixed to the cell floor that restraints can be fastened to." *Id*. at pp. 2, 5. "The purpose of cell eyebolts is to provide staff with an alternative, safe and humane means of restraining violent out-of-control inmates." *Id*. at p. 5.

Plaintiffs' allegations and evidence shows, while on suicide watch, Plaintiff Bango started to believe the sprinkler light in his cell was sending him signals, telling him to kill himself. Dkt. 79, Bango Dec., ¶ 7. After several days, Plaintiff Bango wrapped his suicide smock around the sprinkler, breaking the sprinkler and flooding his cell. *Id*. at ¶ 8. "Jail deputies rushed into [his] cell and tackled [him] to the ground." *Id*. at ¶ 9. Plaintiff Bango was handcuffed behind his back and sprayed in the face with pepper spray. *Id*. Plaintiff Bango states he sat naked and handcuffed on a cell floor for several hours, and, because he was restrained he could not clean

the pepper spray from his face. *Id*. at ¶ 10.[5] Plaintiffs also submitted four use of force incident reports. Dkt. 81-17. These four use of force incident reports reference mental health concerns regarding the inmate on whom force was used. *See id*. The reports, however, note isolated instances when force was used against an inmate after, or while, the inmate was engaged in disruptive and potentially harmful behaviors. *Id*. (inmate attempting to bite correctional officer, inmate screaming and yelling, inmates covering cell windows with mattress and toilet paper).

Evidence also shows the Jail has a use of force policy that is in place to ensure individuals do not hurt themselves or others. Dkt. 95, Jackson-Kidder Dec., ¶ 4. The Jail does not use force to punish or discipline mental health inmates, nor is that Jail policy. *Id*. The Jail uses only force necessary to gain compliance to ensure individuals do not hurt themselves or others, or to prevent escape. *Id*. If force or restraints are used, a "use of force" report must be generated. *Id*. The policy at the Jail for the use of restraint chairs does not permit restraints to be used as a form of punishment or for the protection of property. *Id*. at ¶ 6. A restraint chair may only be used for the safety of an inmate and others. *Id*.

The eyebolt policy was updated in a memo dated September 19, 2017. Dkt. 81-16. The memo reiterated "that under no circumstances may force or restraints be used as a form of punishment[.]" *Id*. at p. 2. The use of eyebolt restraints is limited to cases where there is a threat of self-harm or harm to others and only after de-escalation techniques are considered. *Id*. Further, the least restrictive means will be used to prevent harm. *Id*. The restraints "shall only remain in place as long as [the] inmate is actively attempting, or making threats to, harm self." *Id*. After the September 19, 2017 memo, the Jail began the process of physically removing eyebolts. Dkt. 95,

---

[5] Defendants submitted evidence that pepper spray was not used against Plaintiff Bango; however, at this stage, the Court relies on Plaintiff Bango's version of the event.

Jackson-Kidder Dec., ¶ 5. Patti Jackson-Kidder, the Bureau Chief of the Jail, stated, as of September 17, 2018, removal of all eyebolts would be finalized shortly. *Id*.

Plaintiffs have provided evidence that force has been used on inmates who may have mental health issues. However, the evidence shows there is no policy or practice resulting in a systemic application of unlawful force against the proposed class members. Rather, Plaintiffs have provided isolated instances of force used against inmates who may have mental health issues and were creating Jail disturbances. Accordingly, Plaintiffs have not shown commonality as to their claim that force and restraints are being used to punish the proposed class members.

5. *ADA and RA*

Plaintiffs also assert the Jail's systemic policies and practices violate the ADA and the RA. Dkt. 1, 78, pp. 16, 18-19. "To state a claim of disability discrimination under Title II of the ADA, the plaintiff must allege four elements: (1) the plaintiff is an individual with a disability, (2) the plaintiff is otherwise qualified to participate in or receive the benefit of some public entity's services, programs, or activities, (3) the plaintiff was either excluded from participation in or denied the benefits of the public entity's services, programs, or activities, or was otherwise discriminated against by the public entity, and (4) such exclusion, denial of benefits, or discrimination was by reason of the plaintiff's disability." *Thompson v. Davis*, 295 F.3d 890, 895 (9th Cir.2002); *Duvall v. Cnty. of Kitsap*, 260 F.3d 1124, 1135 (9th Cir. 2001), *as amended on denial of reh'g* (Oct. 11, 2001); 42 U.S.C. § 12132.[6]

[6] To make a claim under RA, a plaintiff must show that: (1) they are an individual with a disability; (2) they are otherwise qualified to receive the benefit; (3) they were denied the benefits of the program solely by reason of their disability; and (4) the program receives federal financial assistance. *Id.* The tests for both the RA and the ADA are so similar, and differ in no material aspect here, they should be analyzed together. *T.B. ex rel. Brenneise v. San Diego Unified Sch. Dist*., 795 F.3d 1067, 1083 (9th Cir. 2015).

Plaintiffs allege they are being denied access to services, programs, and activities because of their disabilities. Dkt. 1, ¶¶ 71-80, 167-68, 173; *see also* Dkt. 78, p. 19. Plaintiffs also allege the use of force and restraint policies are discriminatory and Defendants have failed to make reasonable modifications to these policies and practices. Dkt. 1, ¶¶ 81-90, 167-68, 173; *see also* Dkt. 78, p. 19. During oral argument, Defendants asserted Plaintiffs' ADA and RA claims are conclusory and, therefore, insufficient to show commonality.

There is evidence showing "[t]he least restrictive housing is the goal/default" in the Jail. Dkt. 95, Jackson-Kidder Dec., ¶ 5. If an inmate is placed in restrictive housing, the inmate may still receive visits by the chaplain, visits from professional staff, and, if no sanction prevents, an inmate may still have visitation, limited access to commissary, and access to the library and educational materials. *Id*. at ¶ 7. If an inmate is placed on suicide watch, he is able to access in-person visitation and legal visits, but is not able access outdoor exercise, the library, the commissary, or attend church. Dkt. 81-3, Perez Depo., p. 16.

There is no evidence showing the Jail's policies and practices are systemically applied in a manner that exposes all proposed class members to ADA and RA violations. The conclusory allegations and evidence show, at times, an inmate may be subjected to housing classifications that result in restrictions. *See* Section II.C.3, *supra*. However, evidence shows the Jail's policy is to use the least restrictive housing classification, which is consistent with the ADA. *See* 28 C.F.R. § 35.152(b)(2) (under the ADA, "[jails] shall ensure that inmates or detainees with disabilities are housed in the most integrated setting appropriate to the needs of the individual"). Further, while there is some evidence and allegations that Jail staff has used force against inmates with mental illnesses, there is no evidence showing force was used because of the inmate's mental illness or force has been used in more than isolated instances. *See* Section II.C.4,

supra. As such, Plaintiffs have not shown housing restrictions or uses of force are a result of discriminatory policies or practices. Accordingly, Plaintiffs have failed to show commonality regarding the ADA and the RA claims.

6. *Conclusion*

For the above stated reasons, the Court finds there is a lack of allegations and evidence showing the Jail's policies and practices are systemically applied in a way that exposes all members of the proposed class to a substantial risk of serious harm. Rather, Plaintiffs have alleged, at most, isolated instances of constitutional violations. *See Parsons*, 754 F.3d at 678 (stating individual claims for injunctive relief related to medical treatment are discrete claims for systemic reform); *Parsons v. Ryan*, 289 F.R.D. 513, 521 (D. Ariz. 2013) ("the crucial question is whether there is sufficient evidence of systemic issues in the provision of health care or whether Plaintiffs' allegations are simply many examples of isolated instances of deliberate indifference"); *Gray v. Cty. of Riverside*, 2014 WL 5304915, at *14 (C.D. Cal. Sept. 2, 2014) ("Plaintiffs must provide more than conclusory or "threadbare" allegations that systemic policies and practices exist."). Accordingly, Plaintiffs have failed to show the alleged claims meet the commonality requirements of Rule 23(a)(2).

C. Typicality and Adequacy of Representation

As the Court concludes Plaintiffs have failed to show numerosity and commonality, the Court declines to consider whether the typicality and adequacy of representation requirements of Rule 23(a) have been met. *See Dukes*, 564 U.S. at 349 n. 5 ("In light of our disposition of the commonality question, however, it is unnecessary to resolve whether respondents have satisfied the typicality and adequate-representation requirements of Rule 23(a)."); *Waine-Golston v. Time Warner Entm't-Advance/New House P'ship*, 2012 WL 6591610, at *8 (S.D. Cal. Dec. 18, 2012)

(finding "it is not necessary to determine whether Plaintiffs have satisfied the typicality and adequa[cy] requirements of Rule 23(a)" after finding the plaintiffs did not satisfy the commonality requirement).

D. Rule 23(b)(2) Requirement

To satisfy the requirements of class certification under Rule 23, Plaintiffs must also meet Rule 23(b). *See Zinser v. Accufix Research Institute, Inc.*, 253 F.3d 1180, 1186 (stating the plaintiff bears the burden of demonstrating she has met each of the four requirements under Rule 23(a) and at least one requirement of Rule 23(b)). Plaintiffs assert class certification is appropriate under Rule 23(b)(2). *See* Dkt. 78. After considering the record, the Court finds Plaintiffs have not shown they meet the requirements of Rule 23(b)(2).

Rule 23(b)(2) permits class actions for declaratory or injunctive relief if "the party opposing the class has acted or refused to act on grounds that apply generally to the class, so that final injunctive relief or corresponding declaratory relief is appropriate respecting the class as a whole[.]" Fed. R. Civ. P. 23(b)(2). "Based on this language, courts have held that class claims under Rule 23(b)(2) must be 'cohesive.'" *Fosmire v. Progressive Max Ins. Co.*, 277 F.R.D. 625, 635 (W.D. Wash. 2011) (collecting cases). "The key to [a Rule 23(b)(2)] class is ... the notion that the conduct is such that it can be enjoined or declared unlawful only as to all of the class members or as to none of them." *Dukes*, 564 U.S. at 360 (internal quotations omitted). To certify a class under Rule 23(b)(2), it is generally sufficient "that class members complain of a pattern or practice that is generally applicable to the class as a whole." *Rodriguez v. Hayes*, 591 F.3d 1105, 1125 (9th Cir. 2010). However, Rule 23(b)(2) does not authorize class certification "when each individual class member would be entitled to a *different* injunction or declaratory judgment against the defendant." *Dukes*, 564 U.S. at 360 (emphasis in original).

Defendants contend Plaintiffs have failed to meet the cohesion requirement under Rule 23(b)(2) because there are "so many disparate questions regarding mental illness, treatment, and incarceration." Dkt. 90, p. 28. Defendants argue the relief for each proposed class member is dependent on that person's mental health concerns and not on any alleged systemic failure to provide a certain level of mental health treatment. *Id*. at p. 29.

Evidence in the record illustrates that there is a wide range of mental health care issues at the Jail. *See* Dkt. 91, Muscatel Dec. Dr. Kenneth M. Muscatel, Ph.D., stated "[t]he definition of mental illness is so broad, non-specific, and based on multiple criteria[.]" *Id*. at ¶ 5. The "diagnostic spectrum of symptoms, behaviors, emotions, neurological functioning, developmental features, physical symptoms and issues, and an individual's life experiences are virtually as wide ranging as humanity itself." *Id*. at ¶ 6. Further, mental health assessments in the correctional setting include malingering, nonadherence to medical treatment, obesity, borderline intellectual functioning, wandering behaviors, and anti-social behavior. *Id*. at ¶ 7. Dr. Muscatel opined that treatment options are affected by whether a person has an acute, chronic, situational, or inactive mental health condition. *Id*. at ¶ 8.

Here, Plaintiffs challenge the general policies and practices at the Jail. *See* Dkt. 1, 78. Plaintiffs request equitable relief restraining Defendants from violating the proposed class members' constitutional rights. The general request for injunctive relief fails to indicate how final injunctive relief may be crafted in a sufficiently objective and detailed way so that both Defendants and the Court can determine if Defendants are complying with the injunction. *See* Fed. R. Civ. P. 65(d) (every order granting an injunction must state its terms specifically and describe in reasonable detail the act(s) restrained or required). For example, the amount of medical treatment for one class member may meet constitutional standards, whereas the same

treatment may be constitutional deficient for a second. The same premise applies to the use of force, use of restraints, and classification levels.

Further, more specific relief would require the Court to distinguish, based on circumstances and individual characteristics, how Jail officials may treat class members, rather than prescribing a standard conduct applicable to all proposed class members. For example, if the Court were to issue an injunction prohibiting the use of force against the proposed class members because of their mental illnesses, the Court would be required to craft an injunction taking into account specific circumstances of each inmate's situation. The Court would be required to consider such factors as what specific mental illnesses place an inmate at risk of the use of force, the type of force to which the inmate may be exposed, the circumstances that exacerbate the risk of use of force, and in what instances the use of force or restraints is acceptable. The circumstances that pose a substantial risk of harm to each inmate presumably depends on the nature and severity of the proposed class member's mental illness. As such, class-wide relief would be difficult to provide because a Jail officer's conduct may only be enjoined by references to circumstances that vary among class members.

Additionally, necessary and appropriate medical treatment would depend on the nature and severity of each individual proposed class member's mental illness, not simply because the proposed class member has a mental health illness that qualifies as a disability under the ADA and the RA. Some mentally ill individuals may require medication or may be suicidal; however, not all individuals who are mentally ill would require the same level of care. Further, some mental health matters may need immediate attention, while other requests for treatment may not require the emergent attention. The variety of appropriate treatments for different types and

severities of mental illnesses and the numerous types of mental health issues in the Jail illustrate the Court's inability to form a remedy for the entire proposed class.

In short, Plaintiffs have not shown the relief sought is more specific than a general injunction seeking to enjoin Defendants from violating the constitution. Further, Plaintiffs have not shown the class members are being harmed in a similar way and that one injunction would correctly address the myriad of potential lawful or unlawful actions committed against the proposed class members. As such, the individualized issues related to each proposed class member's needs and injuries overwhelm class cohesiveness. Therefore, Plaintiffs have not met the requirements of Rule 23(b)(2). *See Shook v. Bd. of Cty. Commissioners of Cty. of El Paso*, 543 F.3d 597, 604 (10th Cir. 2008) (internal quotations omitted) ("if redressing the class members' injuries requires time-consuming inquiry into individual circumstances or characteristics of class members or groups of class members, the suit could become unmanageable and little value would be gained in proceeding as a class action"); *Barraza v. C.R. Bard Inc.*, 322 F.R.D. 369, 390 (D. Ariz. 2017) (finding the plaintiffs did not meet Rule 23(b)(2) where "[t]rial of the class representative's claims will not fairly adjudicate the claims of all class members because most of the class members had different" issues and were subject to different affirmative defenses); Thomas M. Byrne, *Class Actions*, 58 Mercer L.Rev. 1171, 1173 (2007) (noting that where "differences in proof or individualized issues exist pertaining to each class member, courts have rejected certification ... [for] failure to meet Rule 23(b)(2)'s requirement that relief apply to the class as a whole.").

III. Conclusion

The Court finds Plaintiffs have failed to meet the numerosity and commonality requirements under Rule 23(a). The Court declines to consider whether Plaintiffs have shown

typicality and adequacy of class representation. The Court further finds Plaintiffs failed to meet the requirements of Rule 23(b)(2). Therefore, the Court concludes Plaintiffs have failed to show class certification is appropriate in this case. Accordingly, the Court recommends Plaintiffs' Amended Motion for Class Certification (Dkt. 78) be denied.

Pursuant to 28 U.S.C. § 636(b)(1) and Federal Rule of Civil Procedure 72(b), the parties shall have fourteen (14) days from service of this Report to file written objections. *See also* FED. R. CIV. P. 6. Failure to file objections will result in a waiver of those objections for purposes of *de novo* review by the district judge. *See* 28 U.S.C. § 636(b)(1)(C). Accommodating the time limit imposed by Federal Rule of Civil Procedure 72(b), the clerk is directed to set the matter for consideration on November 2, 2018, as noted in the caption.

Dated this 15th day of October, 2018.

David W. Christel
United States Magistrate Judge